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THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

FRANCIS NEWARK,

BARRISTER-AT-LAW.

1948

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Lords Justices of Appeal:

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THE RIGHT HON. SAMUEL CLARKE PORTER.

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THE RIGHT HON. ARTHUR BLACK.

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Page 50, footnote, and pages 50-59, running-titles and side-titles—for " King's Bench Division " read " Court of Appeal."

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IN

NORTHERN IRELAND

MINISTER OF AGRICULTURE FOR NORTHERN IRELAND v. McCARTNEY (1).

C.A. 1947.

Feb. 26, 27; June 11.

Emergency legislation—Agriculture—Import of livestock into United Kingdom—Application by Minister for forfeiture order—Application to be made "as soon as practicable"—Limitation of defences which owner is entitled to raise in proceedings—Ultra vires—Invalidity—Agriculture (Miscellenaous War Provisions) Act, 1940 (3 & 4 *Geo.* 6, *c.* 14), *s.* 28 (3)—*Livestock (Import from Eire and Isle of Man) Regulations*, 1945 (*S. R. & O.*, 1945, *No.* 942), *Reg.* 5.

Section 28 (3) of the Agriculture (Miscellaneous War Provisions) Act, 1940, empowered the Minister of Food to make regulations relating to the import of livestock from Eire and the Isle of Man. Under this power the Minister made the Livestock (Import from Eire and Isle of Man) Regulations, 1945, which prescribed the times and places at which livestock might be imported from Eire and the Isle of Man, and contained provisions as to the seizure of livestock imported in contravention of the regulations. By regulation 5 (4) it was provided that every animal so seized should be forfeited unless within twenty-one days after a seizure notice had been displayed the claimant gave notice that the animal was his property and that it had not been imported from Eire nor the Isle of Man, or had not been so imported in contravention of the regulations, "whereupon the

(1) In the Court of Appeal before Babington and Porter L.JJ. and Black J.

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" appropriate Minister shall as soon as practicable apply to the Court " of Summary Jurisdiction " for a forfeiture order. By regulation 5 (5) it was provided that upon the application to the court for a forfeiture order the court should make such order " unless the " claimant proves to the satisfaction of the Court that the animal " was at the time of seizure his property, and that it was not im- " ported or brought into the United Kingdom from Eire or the Isle of " Man, or was not so imported or brought in or dealt with in con- " travention of these Regulations, and the claimant shall not be " entitled to raise any other defence or objection to the making of " the order."

On the 14th August, 1946, twenty-one animals belonging to the claimant were seized by an authorised officer who had reason to suppose that they had been imported in contravention of the regulations. The seizure notice in respect of these animals was displayed on the 16th August, 1946, and on the same day the claimant gave notice claiming the animals. The Minister gave instructions on the 10th September, 1946, for forfeiture proceedings to be taken, and these instructions were received by the Crown Solicitor for Tyrone on the 13th September, 1946. The first petty sessions held thereafter was on the 16th September, 1946, but the summons was not issued until the 18th September, 1946, and the case came on for hearing on the 7th October, 1946. The resident magistrate made a forfeiture order in respect of thirteen of the animals and declared the other eight not to be forfeited.

Both the claimant and the Minister appealed to the Court of Quarter Sessions. It was contended for the claimant that the application for a forfeiture order must be made " as soon as practic- " able " after a claim had been made, and that the application in this case had not been so made. On behalf of the Minister it was contended that the regulations required the application to be made " as soon as practicable " after the expiration of twenty-one days from the display of the seizure notice. It was further objected on behalf of the Minister that the provisions of regulation 5 (5) prevented the claimant raising the defence that the application had not been made as soon as practicable.

The county court judge held that on the true interpretation of the regulations the application for a forfeiture order must be made as soon as practicable after a claim has been made ; that the application in this case had not been made as soon as practicable ; that regulation 5 (5) which purported to limit the defences which a claimant could raise in forfeiture was *ultra vires ;* and that even if regulation 5 (5) were *intra vires* it could only have application to a properly constituted application which had been made as soon as practicable.

On appeal by way of case stated *held* by the Court of Appeal (Babington and Porter L.JJ. and Black J.),

(i) that the words " as soon as practicable " in regulation 5 (4) meant as soon as practicable after a claim had been made, and that there was evidence entitling the county court judge

to find that the application had not been made as soon as practicable;

(ii) that the provisions of regulation 5 (5) which purported to limit the defences which a claimant might raise in forfeiture proceedings could only apply to an application duly brought as soon as practicable.

Held also by Babington and Porter L.JJ. (Black J. reserving his opinion on the point) that regulation 5 (5) was *ultra vires:* by Babington and Porter L.JJ. on the ground that the Act did not authorise the Minister to make regulations to interfere with the procedure of the courts; and by Babington L.J. on the further ground that regulations made by Ministers must recognise the right of the subject to appeal to the courts and there present his case free from arbitrary limitations.

CASE STATED by the County Court Judge and Chairman of Quarter Sessions for the County of Tyrone.

The facts of the case sufficiently appear in the headnote and in the judgment of Porter L.J.

Nicholson K.C. and *J. A. Brown* for the appellant, the Minister of Agriculture for Northern Ireland.

W. Johnson K.C. and *Conaghan* for the respondent.

Cur. adv. vult.

BABINGTON L.J. BABINGTON L.J.: I have had the privilege of reading the judgments about to be delivered by the other members of the court in which the facts and the construction and application of the regulations upon which this case was stated are fully dealt with. I find it unnecessary, therefore, to elaborate the arguments further and I will state my opinion on the questions submitted to us by the learned County Court Judge as shortly as possible.

I entertain no doubt that the direction in regulation 5 (4) that the Minister (in Northern Ireland, the Minister of Agriculture) shall as soon as practicable apply to the Court of Summary Jurisdiction is mandatory and not directory and must be strictly complied with. This being so, it becomes necessary to determine the date from which the time runs for making the application, and on this branch of the argument it

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was conceded by counsel for the complainant that the word "whereupon" relates back to the making of a claim by some person (in this case the respondent), that the animals seized were his property and that they were not imported in contravention of the regulations.

Whether the application of the Minister to the Court of Summary Jurisdiction was or was not as soon as practicable after the notice of claim is a question of fact and this has been determined in favour of the respondent by the county court judge. There was clear and uncontradicted evidence on which he could so find and the only substantial objection to this finding by the complainant was that as further claims might be made within twenty-one days from the posting of a "Seizure Notice" under regulation 5 (3) it was not practicable to apply to the Court of Summary Jurisdiction for condemnation until this period had elapsed.

During the arguments I thought that this might be a reasonable construction of the regulation but on further consideration I have come to the conclusion that it cannot be given effect to, having regard to the terms of the regulation and the mandatory direction contained in paragraph (4). This part of the regulation purports to fix the time when the application is to be brought, namely, as soon as practicable after receipt of the claim, and in my opinion it is not a compliance with the regulation to say that it can be made as soon as practicable within the twenty-one days or as soon as practicable after the expiration of the twenty-one days. The order must be read as it stands and I cannot see any ambiguity in it or any reason for construing it other than according to its plain terms.

The complainant, however, maintained that this defence was not open to the respondent because under regulation 5, paragraph (5), the court must make the order for condemnation unless the claimant proves that the cattle were not imported from Eire or the Isle of Man or not so imported in contravention of the regulations, and that the concluding words of this paragraph "and the claimant shall not be entitled to

" raise any other defence or objection to the making " of the order " debar him from setting up any other defence to the application for the forfeiture of his cattle.

If this latter provision is *intra vires* the court may be precluded from enquiring into the legality or illegality of the prior proceedings, however illegal or unjust they might have been. This is an attempt to deprive the subject of his right to appeal to the courts. It does not say that he cannot come to the court but that when there he can only present such case as the regulation permits, which is to establish a *negative* and this he may be unable to do. His cattle may therefore be seized or condemned on the mere suspicion of the Customs Officer acting without any evidence to support the seizure, and if this provision limiting the respondent's right of defence is *intra vires*, all questions of legality or impropriety or bias on the part of the Customs officers or breach of the regulations by them or by the legal advisers of the Ministry may be ruled out so that they cannot be raised by the respondent or enquired into by the court. There may be many other defences open in such cases but it is not necessary to go further in the realm of imagination to show the seriousness of prohibiting the respondent from submitting any defence other than that allowed by the regulation.

This regulation purports to have been made by the Imperial Minister of Food under section 28 of the Agriculture (Miscellaneous War Provisions) Act, 1940, subsection (3) of which provides :—

" The Minister of Food, if he considers it expedient " so to do having regard to any such arrangement, " may also by regulations—

" (*a*) determine the times and places at which " livestock or any class or description thereof " may be imported or brought into the " United Kingdom from Eire or the Isle of " Man ;

" (*b*) make provision as to the routes to be " followed by livestock so imported or " brought or any class or description thereof, " and as to their detention for inspection ;

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"and any regulations made under this subsection "may contain such provisions as appear to the said "Minister to be necessary for securing the "due operation and enforcement of the "regulations, including provisions as to the "forfeiture of livestock."

What regulations can the Minister make under this subsection? His powers must be subject to some limitation. He cannot, for instance, say that an alleged offender shall go to jail without trial or resuscitate the stocks as a substitute for imprisonment.

In my opinion the regulations must be framed with a due regard to both common law and statute law and must recognise the right of the subject to appeal to the courts and there present his defence free from arbitrary limitations such as the one relied on in this case.

The clause limiting the respondent's right to present his defence is not necessary for securing the due operation and enforcement of the regulations. On the facts of this case it appears to be relied on to save the Minister from his own breach of the regulations, and in so far as it has this effect it obstructs the due operation and enforcement of the regulations and does not secure them. The Minister of Food cannot make regulations under the statute providing for the determining of issues between the Crown and its subjects equally binding on both and in the same regulation provide that if the Crown breaks the regulations the subject shall not be allowed to say so in a court of law.

This part of the regulation is clearly *ultra vires* the section under which it purports to have been made. It deprives the King's subjects of their right to present their case in the courts of justice and is not necessary for securing "the due operation and enforcement of "the regulations."

I have dealt with this issue strictly on the construction of the statute but I am further of the opinion that if, as Avory J. said in *Chester v. Bateson* (1), the question had to be determined as a question of constitutional law, I should agree that this regulation is in

(1) [1920] 1 K.B. 829, 836.

conflict with the constitutional rights of the subject and on this ground also is *ultra vires*.

I also agree with the view taken by the county court judge upon the third question which he has submitted. The words "such an application" in regulation 5, paragraph (5), must mean an application brought in conformity with the regulation, more particularly paragraph (4), and if the court learns that the application of the Minister does not comply with the regulations, it cannot proceed to make a forfeiture order thereon or even to put the claimant on proof because an application which complies with the regulations is the foundation of its jurisdiction.

PORTER L.J.: By section 28 (3) of the Agriculture (Miscellaneous War Provisions) Act, 1940, the Minister of Food was empowered to make regulations relating to the import of livestock from Eire and the Isle of Man. It is therein provided that he may by regulations, (*a*) determine the times and places at which livestock may be imported or brought into the United Kingdom from Eire or the Isle of Man; (*b*) make provision as to the routes to be followed by livestock so imported or brought, and as to their detention for inspection; and to quote the exact words of the subsection "any regulations made under this subsection "may contain such provisions as appear to the said "Minister to be necessary for securing the due operation "and enforcement of the regulations, including pro- "visions as to the forfeiture of livestock."

The regulations (1945, No. 942) made under the above section prescribe the times and places at which livestock may be imported into the United Kingdom from Eire and the Isle of Man and the routes to be followed and also contain provisions as to seizure, detention and forfeiture.

Under regulation 5 livestock imported into the United Kingdom in contravention of the regulations shall be forfeited, and if an authorized officer—a term which includes any member of the Royal Ulster Constabulary—has reason to suspect that any livestock has been imported in contravention of the

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regulations he may seize that livestock and sell it at any time after the seizure whether an order condemning the livestock as forfeited shall have been made pursuant to this regulation at the time of the sale or not.

In Northern Ireland a notice of the seizure called a "Seizure Notice" is to be displayed as soon as practicable at the police barracks nearest to the place of seizure so as to be visible to the public, and the notice is to be kept so displayed between the hours of 10 a.m. and 4 p.m. each day for a period of 21 days.

Regulation 5 (4) then provides "Every animal so "seized or the proceeds of the sale thereof as the case "may be shall be forfeited unless within 21 days after "the day on which a seizure notice is first displayed a "person (hereinafter called 'the claimant') gives "notice in writing to an authorized officer at the port "of landing or police barracks named in the seizure "notice that he claims that (i) the animal was at the "time of seizure his property, and (ii) the animal was "not imported or brought into the United Kingdom "from Eire or the Isle of Man or that it was not so "imported or brought in or dealt with in contravention "of these regulations, whereupon the appropriate "Minister shall, as soon as practicable apply to the "Court of Summary Jurisdiction within whose juris-"diction the place at which the animal was seized is "situate for an order that the animal or the proceeds "of sale thereof as the case may be, be forfeited (here-"inafter called 'a forfeiture order')."

If the Minister admits the claim no application for a forfeiture is required, and in that case or in case upon an application for a forfeiture order no order is made, the animal shall be returned, or as the case may be, the proceeds of the sale of the animal shall be paid to the claimant, and that return or payment shall relieve the Minister and any person acting on his behalf from all liability to the claimant or any other person in respect of the seizure or sale of the animal unless it is established that there was no reason to suspect that the animal had been imported or brought into the United Kingdom in contravention of these regulations.

Regulation 5 (5) provides that "Upon such an "application being made the court shall make a "forfeiture order unless the claimant proves to the "satisfaction of the court that the animal was at the "time of the seizure his property, and that it was not "imported or brought into the United Kingdom from "Eire or the Isle of Man, or was not so imported or "brought in or dealt with in contravention of these "regulations, and the claimant shall not be entitled to "raise any other defence or objection to the making of "the order."

On the 14th August, 1946, twenty bullocks and one heifer were brought by the respondent to the Livestock Grading Centre at Omagh for sale, where he was required by an authorized officer to make a statement giving particulars of the purchase of each animal. The authorized officer having reason to suspect that the animals had been imported or brought into the United Kingdom or otherwise dealt with in contravention of the regulations then seized the animals, prepared and signed a seizure notice on the 15th August, 1946, and the notice was first displayed at the Barracks, Omagh, being the barracks nearest to the place of seizure on the 16th August, 1946, and was kept so displayed for the required period of twenty-one days.

On the same day the respondent's solicitors gave notice in writing to the authorized officer claiming that the animals were the property of the respondent at the time of the seizure and were not imported from Eire or the Isle of Man in contravention of the regulations.

On the 19th August, 1946, the authorized officer had completed his inquiries and investigation and submitted his report to his superior officer, but it was not until the 10th September, 1946, that the Minister of Agriculture signed the direction for the proceedings for forfeiture.

On the 13th September, 1946, the Crown Solicitor for Tyrone received his instructions with the necessary file, and the summons for forfeiture was issued on the 18th September, 1946, for the next petty sessions to be held at Omagh on the 7th October, 1946.

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The summons having been adjourned by consent to the next petty sessions on the 18th October, 1946, the resident magistrate ordered and declared that thirteen of the said animals or the proceeds of the sale thereof are forfeited and that the other eight or the proceeds of the sale thereof are not forfeited.

Both appellant and respondent served notices of appeal, and the county court judge having decided in favour of the respondent, the matter now comes before us on a case stated by the county court judge in the following terms :—

"1. Whether I was correct in deciding that the "complainant did not as soon as practicable "apply to the Court of Summary Jurisdiction "for the forfeiture order ;

"2. Whether I was correct in law in deciding that "the words 'and the claimant shall not be "'entitled to raise any other defence or ob-"'jection to the making of the order' were "*ultra vires ;*

"3. Whether I was correct in law in deciding that "even if the said words were held by the "Supreme Court to be *intra vires* they do not in "the circumstances preclude the defendant "from making the objection that the application "for a forfeiture order has not been made 'as "'soon as practicable'."

Regulation 5 of the regulations specifies the period of twenty-one days during which the seizure notice is to be displayed and within which the claimant must give written notice of his claim, but no specific period is mentioned within which the Minister must apply to the court for a forfeiture order, the words of regulation 5 (4) being "*whereupon the appropriate Minister shall "as soon as practicable apply to the court.*" The commencement of the period is indicated by the word "whereupon," and both parties agreed that this referred not to the day upon which the period of twenty-one days expired but to the day upon which the claimant gave written notice of his claim. The county court judge held that the application was not made as soon as practicable because the summons was

not issued until the 18th September, which was thirty-three days after the making of the claim. Mr. Nicholson contended that the application had been made as soon as practicable, which he said meant reasonably practicable, because the Minister had to await the expiration of the period of twenty-one days in order to see if there were any other claims, and after that period a reasonable time must be allowed for him to be advised as to whether he should take proceedings, and if so advised, to give the necessary instructions to the Crown Solicitor, who must also be allowed a reasonable time in which to commence proceedings. He also argued that the word "shall" in this connection was directory and not mandatory, though the words "shall be forfeited," "shall be returned" and "shall be paid" in the same subclause, and the words "shall display" and "shall "keep so displayed" in regulation 5 (3) are obviously mandatory.

I do not think it was either necessary or reasonable to await the expiration of the period of twenty-one days seeing that the police had completed their investigations with such commendable dispatch on the third day after the claim was made, and the respondent appears to have been a very substantial and well-known cattle dealer—a person not likely to make a bogus claim in respect of cattle which belonged to some other person.

No evidence was given to explain the cause of the delay of thirty-three days, and even if a period of twenty-one days is to be allowed from the date of the making of the claim, that leaves a further period of twelve days of which no valid explanation has been given.

The words "as soon as practicable" occur in the Workmen's Compensation Act (Northern Ireland), 1927, section 14, where it is provided that notice of an accident must be given to the employer as soon as practicable after the accident, and it is well settled that this is a question of fact. (*Shannon v. Banbridge Weaving Co.* (1), *Fearnley Bros. v. Richmond* (2), *Owens v. Llay Main Colliery* (3), *Evans v. Simpson* (4). See

(1) (1911) 45 I.L.T.R. 74.
(2) (1925) 18 B.W.C.C. 81.
(3) (1932) 25 B.W.C.C. 573.
(4) (1926) 19 B.W.C.C. 407.

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also *Anglo American Oil Co. v. Port of London Authority* (1), a decision of Pickford J. on the same words occurring in section 9 of Port of London (Provisional Order) Act, 1910.)

In my opinion there is ample evidence in this case to justify the finding of the county court judge on the first question which I therefore answer in the affirmative.

I shall return to the second question after I have dealt with the third which in my opinion admits of a very simple and obvious answer.

On the assumption that the latter part of regulation 5 (5) is *intra vires*, viz., that the claimant shall not be entitled to raise any other defence or objection to the making of the order, was the claimant precluded from raising the objection that the application was not made as soon as practicable? In my opinion the entire regulation 5 (5) is governed by the opening words "upon *such* an application being made." What are the requisites of *such* an application? It must be brought (*a*) for a forfeiture order, (*b*) by the appropriate Minister, (*c*) as soon as practicable, (*d*) to the Court of Summary Jurisdiction within whose jurisdiction the animals were seized. If any of these essential requirements is absent the court has no power to make the forfeiture order, and the claimant is at liberty to raise every possible defence or objection to the making of the order.

Let us suppose that the application for a forfeiture order was not made until six months after the respondent had claimed the livestock, could it be contended that it was *such* an application as is referred to in regulation 5 (5)? I think not. It would be incredible and contrary to all ideas of justice that in such a case the respondent should not be entitled to rely upon the defence that the application was not made as soon as practicable, and that not having been so made it was not *such* an application as precluded the respondent from raising any other defence than that specified in the written notice of claim.

The answer to question 3 must, therefore, be in the affirmative.

(1) [1914] 1 K.B. 14.

I now come to the second question in which the county court judge asks if he was right in deciding that the words " and the claimant shall not be entitled " to raise any other defence or objection to the making " of the order " were *ultra vires*.

I have already referred to section 28 (3) of the Agriculture (Miscellaneous War Provisions) Act, 1940, under which the regulations were made and which provides that " any regulations made under this sub- " section may contain such provisions as appear to " the said Minister to be necessary for securing the due " operation and enforcement of the regulations including " provisions as to the forfeiture of livestock."

In addition to the specific power conferred upon the Minister to make regulations determining the times and places for the importation of livestock, the routes to be followed and also as to their detention and inspection, he is also empowered by the Legislature to include *such provisions as appear to him to be necessary* for the operation and enforcement of the regulations, including provisions as to the forfeiture of livestock.

It must be admitted that the words of regulation 5 (5) impose a very drastic restriction upon the ordinary rights of a subject, and it seems grossly unfair that the Minister, one of the parties to the litigation, should have the power not only to dictate the procedure of the court and the proofs of the other party, but also to prevent that other party from raising any other defence than that prescribed by the Minister who is his opponent.

Mr. Johnson contended that the purported restriction was an unwarrantable interference with the procedure of the court and the rights of the subject and referred us to *Chester v. Bateson* (1), a decision of a Divisional Court composed of Darling, Avory and Sankey JJ., who held that regulation 2A (2) of the Defence of the Realm Regulations made under the Defence of the Realm Consolidation Act, 1914, was invalid.

That regulation provided that no person should without the consent of the Minister of Munitions take any proceedings for the purpose of obtaining an order

(1) [1920] 1 K.B. 829.

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or decree for recovery of possession of, or for ejectment of a tenant of a dwelling-house occupied by a munition worker and situate in an area declared by the Minister to be a "special area." For the owner of the property it was argued that the Legislature could never have intended to impose such a grave disability upon the subject by means of a Departmental Order, that the owner was thereby deprived of access to every legal tribunal in respect of his property, and that the regulation was invalid as being a flagrant breach of the provision in Magna Charta—"To no one will we sell, "to no one will we refuse or delay right or justice." It was also said that even in the case of the Vexatious Indictment Actions Act, 1896, under which persons could be deprived of the ordinary right of access to the King's Courts it was specially provided that the application for an order under the Act must be made by the Attorney-General, and that it must be proved that the person against whom the order was sought had habitually and persistently instituted vexatious proceedings without any reasonable ground. The court held that the regulation was *ultra vires*. It should be observed that there was no appearance for the Minister who was the respondent in the matter, and in view of later decisions on similar questions arising on departmental orders and regulations it is doubtful if this decision would now be upheld.

In *Rex v. Comptroller General of Patents. Ex parte Bayer Products* (1), a case under the Defence (General) Regulations, 1939, regulation 60E which authorized the Comptroller to make an order suspending the use of a trade mark "if it appeared to His Majesty in "Council to be necessary or expedient"—it was contended that such an order made by the Comptroller would be *ultra vires* because it was neither necessary nor expedient for any purpose laid down by the Emergency Powers (Defence) Act, 1939.

Scott L.J. said that the effect of the words "as "appear to him to be necessary or expedient" was to give His Majesty in Council a complete discretion to decide what regulations were necessary for the purposes

(1) [1941] 2 K.B. 306.

mentioned, and that it was not open to the courts to investigate the question whether or not the making of any particular regulation was in fact necessary or expedient for the specified purposes. Clauson L.J. also said that the court had no jurisdiction to investigate the reasons or the advice which moved His Majesty to reach the conclusion that it was necessary or expedient to make the regulation. "The legislature," he said, "has left the matter to His Majesty and this "court has no control over it." Goddard L.J. also agreed.

In *Liversidge v. Anderson* (1) the House of Lords decided that where the Secretary of State acting in good faith under 18B of the Defence (General) Regulations, 1939, makes an order in which he recites that he has reasonable cause to believe a person to be of hostile associations and that by reason thereof it is necessary to exercise control over him, and directs that that person be detained, a court of law cannot inquire whether in fact the Secretary of State had reasonable grounds for his belief and that the matter was one for the executive discretion of the Secretary of State. Lord Atkin in his dissenting judgment held that the courts had jurisdiction to try whether the Secretary of State had reasonable cause for his belief, but the other law lords decided that in such a case the Secretary of State was the final judge of the reasonableness of the causes on which he took action.

In *Progressive Supply Co. Ltd. v. Dalton* (2), the Board of Trade in exercise of its powers under regulation 55 (1) (*a*) of the Defence (General) Regulations, 1939, made the Check Trading (Control) Order, 1942, which provided that no person should carry on the business of check trading in contravention of any directions given by the Board; and by the Check Trading Direction 1942 the Board prohibited all check traders from charging or accepting any poundage. Farwell J. held he had no power to question the validity of the order. "If the Crown," he said, "acting through its proper "servant, makes a regulation, it must be taken to be a "regulation which the Crown considers to be necessary

(1) [1942] A.C. 206. (2) [1943] 1 Ch. 54.

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"for the defence of the realm and the other reasons "mentioned. It is not for this court to consider "whether there is evidence of any necessity for the "making of such an order."

It may be said that the regulations discussed in these cases were made under a different Act—the Emergency Powers (Defence) Act, 1939, whereas the regulation in the present case is made under the Agriculture (Miscellaneous War Provisions) Act, 1940, and that the same considerations do not apply to the latter regulation. I cannot see that there is any real difference. Both statutes were war measures, and it seems to me that regulations relating to food are every whit as important as those relating to trade marks and check trading. Therefore if the provisions of regulation 5 (5) are duly authorized by section 28 (3) of the Act, it is not competent for this court to inquire whether these provisions are necessary or whether the Minister deemed them necessary for securing the due operation or enforcement of the regulations.

In my opinion, however, regulation 5 (5) is not authorized by section 28 (3) of the Act and is therefore *ultra vires*. The Minister is no doubt empowered to include provisions as to forfeiture of livestock but there is an essential difference between a provision as to *forfeiture* or confiscation which is an administrative act by the Minister, and a provision as to the procedure which the Court must adopt when adjudicating upon the application of the Minister for a *forfeiture order*. There is nothing in section 28 (3) of the Act which can be construed as authorizing the Minister to invade the jurisdiction of the courts or to interfere in any way with the ordinary procedure of the court or to curtail the ordinary right of the claimant to rely upon any legitimate plea which may be open to him.

The onus of proving that the livestock were not imported in contravention of the regulations is imposed upon the claimant by section 259 of the Customs Consolidation Act, 1876, but regulation 5 (5) purports to go a long way beyond that section by depriving the claimant of any other defence except that which is prescribed by his opponent.

The provisions as to forfeiture mentioned in section 28 (3) of the Act were intended to refer to the actual *forfeiture* or sale of the livestock by the Minister and not to the procedure or the judgment of the court to which the Minister applies for what is called a "*forfeiture* "*order.*"

I am, therefore, of opinion that regulation 5 (5) is not authorized by section 28 (3) of the Act, and is *ultra vires*, and that the second question should be answered in the affirmative.

BLACK J.: Before dealing with the questions submitted in the case stated it may be useful to refer shortly to the nature of cases stated by courts of quarter sessions.

By section 26 (1) of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, it was provided that after the determination of an appeal to quarter sessions either party, if dissatisfied with the determination of the court of quarter sessions as being erroneous in point of law, might apply to have a case stated for the opinion of the Supreme Court on the point of law. And section 27 of the Act provided that the Supreme Court should hear and determine the question or questions of law arising on the case. By section 9 of the Criminal Justice Act (Northern Ireland), 1945, a new subsection was substituted for section 26 (1) of the Act of 1935. The effect of this new subsection was that a party could apply for a case stated if dissatisfied with the determination by a court of quarter sessions either of an appeal, or of any issue as to jurisdiction arising on any such appeal, as being erroneous in point of law. This amendment was obviously made for the purpose of placing it beyond doubt that objections going to jurisdiction could be tested on cases stated by quarter sessions. It had recently been held in the Eire courts that such objections could not properly be raised by case stated and that a party to proceedings before justices who wished to have a decision of the superior courts upon an objection going to jurisdiction must proceed not by

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case stated but by certiorari (*A.-G. v. Beirne* (1).) The important point to note, however, is that under the Northern Ireland legislation to which I have referred the function of the Supreme Court is to hear and determine questions of law. They are not given any jurisdiction to determine questions of fact. It is the duty of the court of quarter sessions to decide all questions of fact, and this court must accept the decision of quarter sessions on questions of fact unless, of course, it appears from the case stated that they have purported to decide some point of fact without having evidence before them from which such a decision could properly be arrived at, or that in finding facts they have misdirected themselves in law in any of the forms of legal error which amount to misdirection, to quote the phrase used by Lord Sumner in *Inland Revenue Commissioners v. Lysaght* (2).

I now come to the three questions submitted in the present case stated.

The first question asks whether the learned county court judge was correct in deciding that the complainant did not as soon as practicable apply to the court of summary jurisdiction for the forfeiture order.

It was argued, somewhat faintly perhaps, that the provision contained in Article 5 (4) of the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, that the appropriate Minister should as soon as practicable apply to the court of summary jurisdiction was merely directory and not imperative. I cannot agree with this contention. It is well established that provisions in a statute or a statutory order which appear on the face of them to be imperative cannot without strong reason be held to be merely directory. This is clearly the case in regard to provisions fixing the time within which legal proceedings may be instituted (*Barker v. Palmer* (3), *In re Hart* (4)). Where the regulations in a case of this kind direct that if the Minister wishes to apply for an order for the forfeiture of a man's cattle he shall make the application as soon as practicable it would be in the highest degree unjust

(1) [1943] I.R. 480.
(2) [1928] A.C. 234, 243.
(3) (1881) 8 Q.B.D. 9.
(4) (1943) 169 L.T. 60.

that the Minister should be allowed to hold his hand as long as he chose without apparently any effective remedy being open to the owner of the cattle. As was said by Lord Penzance in *Howard v. Bodington* (1): "I think that everybody will admit that the continu- "ation of a suit, and its hanging over a man's head "beyond the time that the legislature provided, is a "harm, and the extent of that harm it is perhaps not "so easy to measure exactly, but I think it is a harm." Accordingly, I am of opinion that the Minister is not entitled to sustain an application for forfeiture under regulation 5 (4) unless he makes the application as soon as practicable.

Whether an application in any case is brought as soon as practicable must depend upon the circumstances of the particular case. This appears to me to be eminently a question of fact, as has, indeed, been held time and again under the provisions in the Workmen's Compensation Acts requiring notice of the accident to be given as soon as practicable. If such a question was before us upon an application for a writ of certiorari evidence would presumably be admissible to establish whether or not the application by the Minister had been made as soon as practicable. But as the matter is before us on case stated we must accept the findings of fact of the learned county court judge unless those findings can be successfully attacked on any of the grounds which I have indicated. The county court judge states that he held that the application was not made as soon as practicable after the notice of claim was received. This finding cannot be impugned as having been made without evidence. On the facts set out in the case stated the county court judge had ample evidence upon which to come to this conclusion. Indeed, for my own part, I imagine that I would have had little hesitation in coming to the same conclusion on those facts.

It is, however, alleged that the county court judge fell into an error of law by basing his conclusion on the view that according to regulation 5 (4) the Minister was bound to make his application to the court as soon

(1) (1877) 2 P.D. 203, 216.

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as practicable after receiving the notice of claim without having regard to the fact that other claims to the ownership of the animals seized might be received at any time within twenty-one days after the day on which the seizure notice was first displayed. I do not believe that it ever occurred to the draftsman of the regulations that a situation might arise in which claims might be put forward by two or more claimants to the ownership of the same cattle. If such a situation had occurred to the draftsman it would have been quite easy to provide for it by appropriate words. As it is, our duty is simply to construe the regulation as it stands. We are not concerned to adjust its construction to meet a set of circumstances which the draftsman apparently never contemplated. The regulation provides that every animal seized or the proceeds of sale shall be forfeited unless within twenty-one days after the day on which the seizure notice is first displayed a claimant gives notice in writing of his claim *whereupon* the Minister shall as soon as practicable apply to the Court of Summary Jurisdiction for a forfeiture order. Construing the regulation according to its ordinary grammatical meaning, I think it is quite clear that the word *whereupon* relates to the giving by the claimant of his notice of claim. Accordingly I am of opinion that the learned county court judge construed the regulation correctly in holding that it compelled the Minister to apply to the court as soon as practicable after the notice of claim was received.

My view, therefore, as to the first question submitted by the learned county court judge is that the question whether the complainant brought his application for a forfeiture order " as soon as practicable " is a question of fact, that the county court judge had sufficient evidence before him to entitle him to hold that the application had not in fact been made as soon as practicable, and that in so holding he was not guilty of any error of law.

Passing over in the meantime the second question in the case stated, I come to the third question submitted by the learned county court judge. This question is whether the concluding words of regulation

5 (5) "and the claimant shall not be entitled to raise "any other defence or objection to the making of the "order"—assuming them to be *intra vires*—preclude the defendant from making the objection that the application for a forfeiture order has not been made "as soon as practicable."

The argument on behalf of the defendant is that regulation 5 (5) is introduced by the words "Upon "*such* an application being made" and the contention is that this must refer to an application made in accordance with the requirements of regulation 5 (4), that is to say, an application made to the particular court of summary jurisdiction within whose jurisdiction the place is situate where the animals were seized and made as soon as practicable after the service of the claimant's notice of claim. On the other hand it is contended on behalf of the Minister that the words "such an application" at the commencement of regulation 5 (5) simply mean an application for a forfeiture order.

Read by themselves the words "such an application" are clearly ambiguous. I think, however, there are two considerations which point in favour of the construction contended for by the defendant. In the first place if the phrase "such an application" is to be construed as meaning merely an application for a forfeiture order and if the closing words of regulation 5 (5) accordingly debar the defendant from raising the objection that the application for the forfeiture order was not made as soon as practicable after the service of the notice of claim, the consequence will be that the direction in the regulation that the application shall be brought as soon as practicable will be rendered quite ineffective. On such a construction the Minister would be able to disregard this requirement and to delay for months bringing the forfeiture application. When a Statutory Order expressly directs that a legal proceeding must be brought within a limited time—whether that time be a specified number of days or whether it be measured by some such phrase as "as soon as practicable"—I think that the court should be slow to hold that a subsequent ambiguous provision in the order should

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be construed in such a way as in effect to render the earlier express direction a nullity. In the second place, regulation 5 is a highly penal regulation. It provides that an authorised officer may seize a man's cattle upon suspicion that they were brought into the United Kingdom in contravention of the regulations. It casts upon the owner of the cattle the onus of establishing the negative propositions that the cattle had not in fact been imported or dealt with in contravention of the regulations. And it enacts that if the owner does not succeed in discharging this onus his cattle are to be forfeited. In my opinion the defendant is justified in contending that the court ought to construe the provisions of such a regulation strictly and narrowly, and that according to the well-settled rule of construction applicable to clauses imposing penalties or forfeitures, if there is a reasonable interpretation which will avoid the penalty or forfeiture in any particular case, such an interpretation ought to be preferred. In such cases where there is an ambiguity and a choice of two reasonable constructions, the court must give the provision the more lenient one *Tuck v. Priester* (1), *Remmington v. Larchin* (2). Nor have I any doubt that the defendant's contention that the regulation should be strictly and narrowly construed is immeasurably strengthened by the extraordinary provision contained in the concluding words of regulation 5 (5). Quite apart from any question as to whether this provision is or is not *ultra vires*, it is sound principle that where a statute or a statutory order purports to abridge the right of the subject to put forward such defence as he may claim to have when impleaded before a court, the language of such statute or order, to quote from the well known judgment of Scrutton J. in *In re Boaler* (3), should be jealously watched by the courts and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension.

If, then, regulation 5 is to be construed strictly and narrowly and if the concluding words of regulation

(1) (1887) 19 Q.B.D. 629.
(2) [1921] 3 K.B. 404.
(3) [1915] 1 K.B. 21.

5 (5) are to be given their least onerous meaning, it would appear to follow that the ambiguous opening words of regulation 5 (5): "Upon such application being "made," ought to be construed as referring to an application duly brought in accordance with the provisions of regulation 5 (4), that is to say, brought at the court of summary jurisdiction within whose jurisdiction the place where the animals were seized is situate, and brought also within the time prescribed by regulation 5 (4), namely, as soon as practicable after receipt of the notice of claim. On this construction regulation 5 (5) only deals with an application duly brought in conformity with regulation 5 (4) and its last sentence will only preclude the claimant from raising defences and objections to such an application. It will not preclude him from showing that the application is not one duly brought in accordance with regulation 5 (4). Thus it will not prevent him from objecting that the application has been brought at the wrong court of summary jurisdiction. Nor in my opinion will it prevent him from objecting that the application has not been brought as soon as practicable.

In my view, therefore, the third question submitted in the case stated should be answered by holding that the learned county court judge was correct in law in deciding that even if the concluding words of regulation 5 (5) are *intra vires* they do not preclude the defendant from making the objection that the application for a forfeiture order has not been made "as soon as "practicable."

If I am correct in the views which I have formed in regard to the first and third questions submitted in the case stated, this will be sufficient to sustain the learned county court judge's decision in favour of the defendant on the appeal, and so far as regards the present case the much wider issue raised in the second question becomes of merely academic interest. Personally I would prefer to postpone making a definite pronouncement on this issue until a case comes before this court in which a ruling on the precise point is found to be essential for the decision of the case. Inasmuch, however, as the question has been argued

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before us I think it right to make a few observations upon it.

The Livestock (Import from Eire and the Isle of Man) Regulations, 1945, replaced the Livestock (Import from Eire and the Isle of Man) Regulations, 1940 (S. R. & O. 1940, No. 1500). Regulation 5 (5) of the 1945 regulations corresponds almost word for word with regulation 5 (4) of the 1940 regulations, except that the 1940 regulations did not contain the words "and the claimant shall not be entitled to raise any "other defence or objection to the making of the "order." These words are an extraordinary, not to say startling, provision to find in statutory regulations. I cannot recollect ever having seen anything resembling them either in statute or in statutory orders. Without them the order was already a drastic one. A man's cattle could be seized on suspicion by an official and sold at such price as they would fetch. The owner of the cattle had then to face forfeiture proceedings by the appropriate Minister. In those proceedings the onus was not placed on the Minister to justify the claim for forfeiture but was cast upon the owner of the cattle to establish by evidence satisfactory to a court that the cattle had not been brought into the United Kingdom in contravention of the regulations. What the occasion was for the addition in 1945 of the words now standing at the end of regulation 5 (5) I do not know. It may be assumed that such words were not added without strong reason. One conjectures that it had emerged in proceedings under the 1940 regulations that some defence or defences could be raised which commended themselves to the courts as being sound in law but which the Ministry found embarrassing. We have not been told, however, what these defences were and I confess that I do not find it easy to see what precisely was aimed at by the added words. At the Bar it was suggested that they were intended to cover cases where the defendant sought to establish that the authorised officer had been actuated by spite and that he had not in fact any reason to suspect that the cattle had been imported in contravention of the regulations or cases in which

the defendant wished to raise a defence of *res judicata*. These suggestions are not impressive, and I fancy it will be found that there is very little scope for the operation of the words complained of. The words themselves have been the subject of criticism by defendant's counsel which has lacked nothing in vigour. They are said to contravene Magna Charta and the Bill of Rights and to be a flagrant attempt to place the doings of the executive outside the reach of the law. They are certainly calculated to provoke instinctive opposition on the part of anyone brought up in the traditions of English law. One wonders whether there is any likelihood of the phrase becoming common form or being adopted as a precedent by any of the departments which have been entrusted by Parliament with the responsible task of framing Statutory Regulations. I understand that a committee has been appointed by Parliament for the purpose of considering Statutory Rules and Orders. I would most respectfully venture to suggest that the fact that such a provision as that contained in the concluding words of regulation 5 (5) has found its way into a set of Statutory Regulations is so striking and of such wide and general importance as to warrant the attention of this committee.

The task, however, for the court in connection with the clause is not to expatiate upon its constitutional propriety or otherwise but is merely to consider whether or not it is *ultra vires*. The regulations are made under the provisions of section 28 (3) of the Agriculture (Miscellaneous War Provisions) Act, 1940, which enables the Minister of Food, if he considers it expedient so to do having regard to any arrangement made by him for the purchase of livestock produced in the United Kingdom, to make regulations as to the times and places at which livestock may be imported from Eire or the Isle of Man and to make provision as to the routes to be followed by livestock so imported. And the subsection goes on to provide that such regulations may contain such provisions as appear to the Minister to be necessary for securing the due operation and enforcement of the regulations, including

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provisions as to the forfeiture of livestock. By the concluding words of the subsection it is directed that sums retained out of the proceeds of any sale of livestock forfeited under any such provision shall be paid into the Exchequer.

The power to include provisions for forfeiture in regulations made under the subsection is clearly intended to authorise forfeiture as one of the sanctions for non-observance of such regulations. I think it would clearly not be within the powers of the Minister under the subsection to make regulations providing for the forfeiture of a person's cattle on suspicion that they had been imported in breach of the regulations without giving him an opportunity of making his case before some tribunal. A statute will not easily be construed as authorising the forfeiture of a subject's property without trial and without compensation. The point to be determined in almost every instance will be whether the cattle were in fact imported in breach of the regulations. If the concluding words of regulation 5 (5) debarred the owner from making his case on this point I should have no hesitation in holding them to be *ultra vires*. Assuming for the moment that regulation 5 (4) is *intra vires* and that the only point at issue is whether or not the cattle were illegally imported, I do not as at present advised see how the concluding words of regulation 5 (5), however objectionable their form, can prevent the owner from making his case that the cattle were not illegally imported. Instead of framing a regulation directing that after seizure of cattle and a claim by the owner judicial proceedings had to be instituted by the Minister to have the cattle declared forfeited the draftsman might conceivably have provided that the seized cattle would be automatically forfeited after notice to the owner unless the owner instituted proceedings within a specified time and established in those proceedings that the cattle had not been illegally imported. Such a regulation would, so far as I can see, have exactly the same effect as the existing regulation, with the advantage that it would not contain the phrase which is now challenged. And if

the existing regulation without the challenged phrase is *intra vires* I do not at present see why such a regulation as I suggest would necessarily be *ultra vires*.

The question, however, still remains whether the existing regulation is *intra vires*. When cattle imported in contravention of the regulations are seized and sold, the purchaser may resell them and as time goes on they may pass through many hands and the Ministry may completely lose trace of them. Months afterwards they may conceivably be seized again in another part of the Province by an authorised officer on suspicion of being illegally imported. The then owner may be prepared to call all the necessary evidence to establish their identity with the cattle previously sold under the regulations. The Ministry's officials may genuinely but mistakenly refuse to believe this evidence. If the regulations are such as to compel the owner in such case to submit to the forfeiture of his cattle and to preclude him from establishing the true state of affairs it is not easy to see how they could be upheld as *intra vires*. It would be utterly unreasonable that section 28 (3) of the Act of 1940 should be construed as authorising regulations bringing about the forfeiture of a man's cattle under such circumstances. But if in such a case the owner wishes to prevent the forfeiture how is he to proceed under the provisions contained in regulation 5 ? Under regulation 5 (4) the cattle must be forfeited unless he makes a claim stating that they had not been imported in contravention of the regulations. He cannot truthfully do this. Even if he does make such a claim he cannot prove it. And under the concluding phrase of regulation 5 (5) he is debarred from attempting to establish what would be his true defence to the forfeiture application. As this wider aspect of the matter has not been debated before us I forbear to offer any concluded opinion upon it. It may indeed be that there is some easy answer to the difficulty which I have indicated. But the existence of the difficulty confirms me in my view that inasmuch as the learned county court judge's decision in favour of the defendant must be affirmed as a result of this court's answers to

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the first and third questions submitted in the case stated it would be better to defer a final pronouncement upon these questions of *ultra vires* until a case arises in which a ruling upon them is essential for its decision.

Appeal dismissed.

Solicitor for the appellant : *Chief Crown Solicitor.*

Solicitors for the respondent : *Shields & Murnaghan.*

J. McC.

EGLANTINE INN, LTD. v. ISAIAH SMITH AND WILLIAM SMITH (TRADING AS "THE CROMAC PRINTERY") (1).

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May 12; June 3, 4, 9, 11; July 25.

Defamation—Libel—Trade dispute—Handbill printed for distribution by agents of trade union in trade dispute—Liability of printers—Privilege—Malice of trade union imputed to printers—Trade Disputes Act, 1906 (6 *Ed.* 7, *c.* 47), *s.* 4 (1).

The plaintiffs, proprietors of an inn, were involved in a trade dispute with a trade union which was endeavouring to establish the principle of "the closed shop" among the plaintiffs' employees. In the course of the dispute an official of the trade union composed a handbill defamatory of the plaintiffs, and this was printed by the defendants in the ordinary course of business and distributed by agents of the union in the vicinity of the plaintiffs' inn. There was no direct publication by the defendants other than the act of handing over the printed copies of the handbill to the trade union official who had composed it. In an action for damages for libel the defendants pleaded that there was no publication by them, and that the libel was not actionable by reason of s. 4 of the Trade Disputes Act, 1906. They also pleaded the defences of fair comment and privilege.

Held, (i) that the handing over by the defendants of the printed copies of the handbill to the person who had composed it was not itself a publication, but that as the defendants must be taken to have known that the handbills were to be published they were responsible in law as joint tortfeasors with the trade union for the subsequent publication by the latter's agents;

(ii) that the immunity enjoyed by the trade union by virtue of section 4 (1) of the Trade Disputes Act, 1906, did not extend to confer a similar immunity on a joint tortfeasor;

(iii) that the defence of fair comment failed as the defamatory document contained allegations of fact which were not truly stated;

(iv) that the publication of the libel was prima facie privileged in that the trade union had an interest in communicating the contents of the handbill to actual or potential customers of the inn, but that this prima facie privilege was avoided by reason of the facts that (*a*) the handbill had been distributed indiscriminately and to persons not being actual or potential customers, and (*b*) that the union was guilty of malice in publishing the libel, and that this malice on the part of the union could be imputed to the defendants as joint tortfeasors.

Smith v. Streatfeild [1913] 3 K.B. 764 approved.

(1) In the King's Bench Division before Andrews L.C.J.

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EGLANTINE INN, LTD. *v.* ISAIAH SMITH AND WILLIAM SMITH.

ACTION tried by Andrews L.C.J. without a jury.

The plaintiffs were the proprietors of licensed premises known as the Eglantine Inn in the City of Belfast and members of an association of employers known as the Belfast and Ulster Licensed Vintners' Association. In 1940 this Association entered into an agreement with the Barmen's Branch of the Amalgamated Transport and General Workers Union (in this report hereinafter referred to as "the Union") regulating the wages and conditions of service of barmen by which it was agreed *inter alia* that the Vintners' Association would encourage all barmen and apprentices who had served the probationary period to become members of the Union.

In 1946 officials of the Union demanded that all employees at the Eglantine Inn should join the Union. All the employees in question were ready and willing to join the Union with the exception of James O'Kane, the manager, who resolutely refused. The Union officials thereupon urged the plaintiffs to dismiss O'Kane, and on their refusal to do so the Union officials tried unsuccessfully to induce the other employees to strike. On the 3rd March, 1947, the Union decided to picket the plaintiffs' Inn, and Oliver Keheely, the secretary of the Barmen's Branch of the Union, composed a handbill for distribution by the pickets. This handbill was in the following form :—

"BARMEN'S TRADE DISPUTE. WHY THE DISPUTE.

"The cause of the trouble in the first instance is "the manager of this House. Repeated attempts "have been made to get this person to join the "Union with his fellow members, but this he has "obstinately and persistently refused.

"Part of our agreement with the Licensed Vint- "ners Association states—'that publicans will en- "courage their staff to join the Union'. The "majority of the publicans have loyally carried out "this agreement with the exception of the pro- "prietors of this House, who have threatened with "dismissal the Union members of the House if any "action were taken to make the manager fall in line "with his fellow-workers.

"We are fighting for 100 per cent. Trade Unionism "in the Spirit Trade to maintain wages and con- "ditions the organised barmen have won.

"A non-Trade Unionist is a danger to the organised "workers in any trade or industry.

"During this dispute we appeal to you to "patronise houses where only Trade Union labour "is employed."

On the 4th March, 1947, Keheely took the manuscript of the handbill to the defendants, a father and son, who carried on business as "The Cromac Printery," for the printing of two thousand copies as a "rush "order." This order was executed by the two defendants in person and the learned judge found that it was not published by the defendants to any member of their staff. After being printed the handbills were wrapped up and handed to Keheely the same day. During the next two months these handbills were distributed to members of the public entering or passing the plaintiffs' Inn by pickets employed by the Union.

The plaintiffs brought this action for libel and in their Statement of Claim averred that by the words in the handbill the defendants meant and were understood by those who read them to mean that the plaintiffs had been guilty of intimidating their employees for the purpose of protecting their manager, that they supported their manager in his refusal to join a trade union, that they were opposed to their employees being members of a trade union, that there was dissatisfaction and dissension among their employees, that they were unable or unwilling to control their employees, that they had failed to honour an agreement existing between the Vintners Association and the Union, and that they were guilty of disreputable and dishonourable conduct in the management of their business.

By their defence the defendants denied publication, and pleaded that the words complained of were printed by them in the form of a circular to the order of 11/46 Barmen's Branch of the Amalgamated Transport and General Workers Union—a trade union registered under the Trade Union Acts. They further pleaded

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that the publication, if any, of the words was by the said Union, which was not actionable. They denied the innuendoes laid by the plaintiffs, and pleaded privilege based upon an interest or duty on the part of the Union to communicate the words to those to whom they were published, being persons who were or might become customers of the plaintiffs and who had a corresponding interest or duty to receive such communication. They further pleaded that the words were printed by the defendants in the ordinary course of their business as printers, and that the printing in the form of a circular was a reasonable and necessary step in the preparation of the said communication to be made by the Union to the persons concerned. They also pleaded the "rolled-up" plea in its usual form. The plaintiffs in reply averred that the defendants were actuated by express malice.

The learned judge found (1) that the contents of the handbill constituted a libel on the plaintiffs and that the innuendoes laid were proved; (2) that the handbills were printed by the defendants in the ordinary course of their business as printers; (3) that there was no separate and independent publication of the handbill by the defendants; (4) that the handbill was distributed indiscriminately to members of the public by the men who were picketing the plaintiffs' premises; (5) that the publication of the handbills interfered with the plaintiffs' trade, caused them loss and damage, and injured their trading character and reputation. He further found that the handbill contained false statements of fact in that it stated untruly that the agreement between the Vintners Association and the Union provided that "the publicans will encourage their "staff to join the Union" whereas in fact the agreement provided that "the Association . . . will "encourage all Barmen and Apprentices who have "served the Probationary Period to become Members "of the Union"; and that it falsely stated that the plaintiffs had not loyally carried out the agreement between the Association and the Union, and in particular had threatened with dismissal the Union members in their employment if any action, including a strike, were taken to make their manager fall in line.

McSparran K.C., *Johnson K.C.* and *Agnew* for the plaintiffs.

Curran A.-G. and *Fox* for the defendants.

The arguments of counsel sufficiently appear from the judgment.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J.: after stating the facts and his findings continued :—

The first question to be determined is whether the defendants should be held in law to have published these defamatory handbills, for of course without publication no action can be maintained. I have already stated that there is no evidence of publication to any of their employees. Further, I have no hesitation in holding that the defendants did not publish the libel merely by handing the printed handbills in a parcel to Keheely, who, as their author, was already more familiar with their contents than they either were or could reasonably have been expected to be. Were the law otherwise a clerk or typist to whom a defamatory statement was handed by his or her employer to be copied would be liable to damages in an action of libel when he handed it back to the employer, on the ground that he or she had published the words complained of "to some person other than the "plaintiff." No case has been cited to me, nor am I aware of any, in which such an unjust and, as it appears to me, absurd conclusion was ever arrived at ; and it is only fair to the plaintiffs' counsel in the present case to say that such a contention was not advanced before me. This, however, does not exhaust the possibilities of legal publication by the defendants on the facts proved in the present case. Mr. Johnson, on behalf of the plaintiffs, presents his case in regard to publication briefly thus. He submits that all persons concerned in the publishing of a libel are jointly liable as joint tortfeasors ; and that a printer who sends forth a libel is liable as its publisher. It appears to me that there is much to be said in support of this view if once it be established as a fact, either from his being so

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informed or by reason of the very nature of the document itself, that the printer knew or must be taken to have known that it was going to be published, and that he was performing a necessary act in or an essential part towards such publication. In my opinion in law such circumstances as these may amount to a joint publication, though the printer does not himself actually perform or take any active part in the act of distribution. This proposition, which in my opinion is founded on sound legal principle, is recognised in several legal text books on the subject. See Gatley on Libel and Slander, 3rd ed. 108-9. Odgers on Libel and Slander, 4th ed. 164. Hailsham's Edition of Halsbury's Laws of England, Vol. 20, pp. 445-6. "All "persons concerned in the commission of a joint tort," says the learned editor of Gatley, "are jointly and "severally liable for all the damage caused by it. 'If "'one repeat, and another write a libel, and a third "'approve what is wrote, they are all makers of it; "'for all persons who concur, and show their assent "'or approbation to do an unlawful act, are guilty "'*R. v. Paine* (1).' Thus where a libel is contained "in a newspaper, the author of the libel, and the "proprietor, editor, printer and publisher and vendor "of the paper are jointly and severally liable for the "full amount of the damages recovered by the "plaintiff." Perhaps I might also be permitted to quote from Clerk and Lindsell on Torts, 9th ed. 595 :— "The publication of a libel may be a joint tort, "as where in pursuance of a common design one com- "poses, another prints and another distributes a libel." The passages which I have cited from these standard text-books must, however, be qualified to this extent, that it has long been recognised that as regards the publication of a libellous article in a newspaper the liability is different in the case of a person who is the author, printer, or, as it has been styled, "the first or "main publisher of a work which contains a libel" from the case of a person who has only taken a subordinate part in disseminating it, such as by selling a copy of the newspaper. *Emmens v. Pottle* (2). The same law applies to the publication of defamatory

(1) (1696) 5 Mod. 163, 167. (2) (1885) 16 Q.B.D. 354.

words in a book, and in my opinion it must also apply to the printing and publication of a libel contained, as in the present case, in a handbill obviously intended for wide distribution. Authority on the subject is not as abundant as one would have expected it to be; and, without an opportunity for perusal of the report, it is with hesitation that I refer to *Newton v. City of Vancouver* (1), in which, according to footnote (12) in Gatley, 3rd ed. 105, it was decided that "the printer of a "defamatory circular cannot rely on the defence of "innocent dissemination." It was said by Wood B. in *Maloney v. Bartley* (2), that "the mere delivery of a "libel to a third person, by one conscious of its con-"tents, amounts to a publication." On the facts of the present case, however, I rely upon the handing over of the handbills by the defendants to their author, Mr. Keheely, not, as I have already mentioned, as a publication to him, but rather as important evidence of a joint production and publication. I obtain further assistance in support of the view of joint or co-operative action in the fact that the defendants' principal line of defence, apart from non-publication, is privilege—a privilege, to which I shall refer more particularly later, not of their own, for as printers they had no interest or duty to communicate the contents of the handbill to potential customers of the plaintiffs or to anyone else, but a privilege which, it was submitted on their behalf, was the privilege of the Trade Union. With such Union they further identified themselves in the concluding words of the plea—"That the printing of "the said words in the form of a circular was a reason-"able and necessary step in the preparation of the said "communication to be made by the said Trade Union "to the said persons concerned." In thus attracting to themselves the benefit of the Union's privilege, the defendants appear to me to recognise fully the nature of their joint and concerted action in the production and publication of the handbills.

Here I would refer to one further matter of importance. The Trade Disputes Act, 1906, passed into law in furtherance of a policy upon which I am not

(1) (1932) 46 B.C.R. 67. (2) (1812) 3 Camp, 210, 213.

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called to express an opinion, confers upon trade unions, whether, as the statute says, of workmen or masters, their members and officials, an immunity in respect of any tortious act alleged to have been committed by or on behalf of the trade union. The legislation stopped short of extending its protective wing over the printers of any defamatory statements issued by or on behalf of such unions. This, at least, appears to have been a wise decision ; otherwise, so far as civil remedies are concerned, there would be little or no check upon the unrestrained outbursts of unbridled tongues or of virulent pens, from whichever side they came. The object aimed at in the law of libel is restraint upon the dissemination of defamatory statements ; and, with the exception of broadcasting, there is no way in which such statements could be more rapidly and widely circulated than through the agency of the printing press.

Now, I have referred to the defendants and the Union as joint tortfeasors. In my opinion this is a perfectly correct term to apply to them notwithstanding the provisions of section 4 of the Trade Disputes Act, 1906 (1). This section, whilst recognising in express terms that a trade union may commit a tortious act, merely provides that an action against them in respect thereof shall not be entertained by any court. In other words, the Union can commit a legal wrong, but it is not an actionable wrong. This immunity, however, does not affect the right of the injured party to maintain an action against the other joint tortfeasor, the printer. This point was dealt with by Younger J. in *The London Motor-Cab Proprietors Association and The British Motor-Cab Co. (Ltd). v. The Twentieth Century Press* (1912) (*Ltd.*) (2). That action was similar to the present in this respect that the defamatory document complained of was printed by the defendants on the instructions of a trade union in the form of a

(1) Trade Disputes Act, 1906, s. 4 (1) : " An action against a trade " union, whether of workmen or " masters, or against any members " or officials thereof on behalf of " themselves and all other members " of the trade union in respect of " any tortious act alleged to have " been committed by or on behalf " of the trade union, shall not be " entertained by any court."

(2) (1917) 34 T.L.R. 68, 69.

circular, 4,000 copies of which were delivered to the trade union. The report of the case to which I have referred is of an application which was made to the court for an interlocutory injunction, which, for reasons immaterial to the present case, was refused. In the course of his judgment, however, Younger J. is reported thus : " There was a further reason put forward " against granting the injunction—that by the Trade " Disputes Act, 1906, no action was maintainable " against a trade union, and that it was a grave con- " sideration whether the Court should grant an in- " junction against the printers in such a case as this, " because that would be much the same as granting it " against the trade union and would nullify the pro- " tection given. That contention had not been argued " that day, and he did not think that it was one which " would commend itself to the sympathetic considera- " tion of the Court. The Act, he thought, was not " intended to deprive persons maliciously defamed of " their remedy, and as at present advised the argument " would not commend itself to him."

Having so held the issue of publication against the defendants, it becomes necessary to consider whether, on my findings of fact, the defendants are entitled to succeed on either of the other two pleas advanced on their behalf :—(1) the " rolled-up " plea and (2) the plea of privilege. The so-called " rolled up " plea was first sanctioned in *Penrhyn v. Licensed Victuallers' Mirror* (1), and for a time there was much doubt and misconception as to its real nature. The decision of the House of Lords in *Sutherland v. Stopes*, (2) however, set these matters at rest when the noble Lords held that this plea is not a plea partly of justification and partly of fair comment, rolled into one, but rather one of fair comment only. (See the speeches of Viscount Finlay at p. 62 of Lord Shaw at p. 77 and of Lord Carson at p. 99). Accepting this view, the defence does not seem to me to be an appropriate one in the present case ; for, as I have already pointed out, the defamatory document does not purport to contain any expressions of opinion or comment ; it purports, as I read it, to be

(1) (1890) 7 T.L.R. 1. (2) [1925] A.C. 47.

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one continuous assertion of facts. In any event the allegations of fact are not, as I have held, truly stated, so that the necessary foundation is not laid for a plea of fair comment. This defence, accordingly, also fails.

The only plea which remains to be considered is that of privilege—the privilege of the Trade Union upon which the defendants seek to rely. The competency of such a plea of what has been called "incidental "privilege of printers" is not in question. This was expressly admitted by Mr. McSparran on behalf of the plaintiffs, the printing of the handbills being carried out by the defendants in the ordinary course of their business and being reasonably incidental to the preparation and distribution thereof. I was referred by the learned Attorney-General to a precedent of such plea in Gatley, 3rd ed. at p. 832, which is based upon the principles of the law laid down in *Edmondson v. Birch* (1), *Osborn v. Boulter* (2), and *Nevin v. Roddy* (3). Assuming, therefore, the legal propriety of the plea in the present case, I am of opinion that a prima facie case of qualified privilege is established by the defendants in so far as the distribution of the handbills was confined to actual or potential customers of the plaintiffs' Inn. The Trade Union had an undoubted interest in making the communication, as they were vitally concerned with the establishment of the principle of 100 per cent. trade unionism, and they looked to the public to co-operate with them in achieving this end by abstaining from patronising the Inn. In my opinion such customers had a corresponding interest in receiving the information as relevant to the question of whether they would or would not extend their custom to the Inn. On the evidence, however, I have come to the conclusion that the distribution of the handbills was not always confined to actual or potential customers, but was extended on occasions, such as the woman with the perambulator, to a wider section of the public—the ordinary passers-by. For such publication of the libel there was in my opinion no privilege. *Chapman*

(1) [1907] 1 K.B. 371.
(2) [1930] 2 K.B. 226.
(3) [1935] I.R. 397.

v. Lord Ellesmere and Others (1). "A man," said Earl Loreburn, in *Adam v. Ward* (2), "ought not to be "protected if he publishes what is in fact untrue of "some one else when there is no occasion for his doing "so, or when there is no occasion for his publishing it "to the persons to whom he in fact publishes it." Further, I am of opinion that in law the defendants, though not themselves actuated by malice, lost the shelter or protection of privilege by reason of the malice which the plaintiffs have satisfied me actuated the Trade Union in publishing the libel. The onus of this issue lies with the plaintiffs, and in my opinion they have discharged it. Malice which avoids or destroys privilege is a wrong feeling or motive in the mind of the defendant at the time of the publication and which actuated him in making it. I am of opinion that the defamatory statement complained of in the present case was not merely rashly or improvidently made without sufficient thought by a Union which believed its contents to be true and had reasonable grounds for such belief. In my opinion the Union acted from indirect and wrong motives. They set out to achieve their object of forcing O'Kane to join the Union, and as a means towards that end they were determined, so far as it was possible for them to do so, to cause a boycott of the plaintiffs' Inn by the public and so to put pressure upon the plaintiffs which would compel them in their own interests either to make O'Kane join the Union or, if he would not do so, to dismiss him. I hold that the Union did not believe the statements to be true nor had they any reasonable grounds for such a belief, and that they were guilty of express, or, as it is sometimes called, actual malice. (See the judgment of Brett L.J. in *Clark v. Molyneux* (3).) Such malice defeats the privilege.

In imputing this malice of the Trade Union to the defendants I am acting upon the decision of Bankes J. in *Smith v. Streatfeild and Others* (4). In that case the writer of a pamphlet employed a firm of printers to

(1) [1932] 2 K.B. 431, 465, 467.
(2) [1917] A.C. 309, 321.
(3) (1877) 3 Q.B.D. 237, 247.
(4) [1913] 3 K.B. 764.

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print it, and subsequently circulated it among persons having with him a common interest in its contents. It contained statements defamatory to the plaintiff, and in making them the writer was actuated by malice. The printers acted in the ordinary course of their business and without malice. In these circumstances Bankes J. held that the privilege of the occasion extended to the printers, but that the malice of the writer defeated the privilege both for the writer and for the printers, and that they were joint tortfeasors who were jointly liable to the plaintiff. It is no doubt true, as pointed out by the learned Attorney-General, that in that case the printers admitted the publication complained of ; but I am not citing the case on that issue. I have already held joint publication as a fact. In the course of his judgment (at p. 769) Bankes J. refers to *Clark v. Newsam* (1), in which Rolfe B. said that " when " two persons have so conducted themselves as to be " liable to be jointly sued, each is responsible for the " injury sustained by their common act." Bankes J. continues : " In my opinion it follows from this rule " of law that in the case of a joint publication of a " libel each tortfeasor is liable for the malice of the " other. It may very well be that in assessing damages " the jury may take into account the fact that one of " the two persons jointly responsible for the publication " of the libel may be morally blameless, and may " consequently refuse to give anything in the nature of " vindictive damages in a verdict which will affect " him, but this does not affect his liability for the " publication."

This expression regarding the law of malice in the case of joint tortfeasors was cited to the Court of Appeal in England in *Crozier v. Wishart Books Ltd. and Others* (2), but the Court did not feel compelled to express any concluded opinion upon its soundness. The Court, Slesser and Scott L.JJ., expressly reserved this question " of great importance " for future consideration ; and I am unable to trace any reported case in which the question has since arisen. In the circumstances I follow the opinion expressed by

(1) (1847) 1 Ex. 131. (2) [1936] 1 K.B. 471, 475.

Bankes J., with which I respectfully concur. In my opinion it is both common sense and good law that one tortfeasor, who relies upon a defence provided for him by a fellow tortfeasor by attracting the latter's privilege to himself, can only do so by taking such defence in its entirety and with all its infirmities, one of which is that it is liable to be defeated by such party's malice. He cannot claim the protection of another's privilege and at the same time dissociate himself from that same person's malice. It would be, indeed, a strange result were it to be held that A, who has no defence of privilege in himself, should be held to have a good defence to an action because of the privilege of his joint tortfeasor B, whilst the latter was unable to protect himself under that same privilege by reason of his own malice. Such a conclusion would appear to me to be quite illogical, and I decline to accept it unless compelled to do so by higher authority.

In the assessment of the damages to which the plaintiffs are entitled, I have regard to the views expressed by Bankes J. to which I have already referred in regard to parties who are "morally blame-"less." At the same time I cannot shut my eyes to the fact that the plaintiffs' trade and reputation must have suffered, and that, when called upon by the plaintiffs' solicitor, the defendants declined to sign a withdrawal and apology, and that this action, with its heavy costs to both sides, is the natural consequence of such refusal. In all the circumstances of the case I assess the damages at £50 and allow the plaintiffs the costs of the action.

Judgment for the plaintiffs.

Solicitors for the plaintiffs : *O'Rorke & Son.*
Solicitor for the defendants : *A. Lunn.*

J. McC.

K.B.D. (Probate). 1947.

Nov. 7, 11, 8.

IN THE GOODS OF GILKINSON (1).

Administration—Testator's executors prove will—Last surviving executor dying testate—Executor of last surviving executor omitting to prove his will—Application by testator's widow for administration with will annexed—Grant ad colligenda bona—Jurisdiction of court—The Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict., c. 79), s. 78.

A testator by his will appointed two executors and after making some bequests left his residuary estate, including a farm of land registered in the testator's name under the Local Registration of Title (Ireland) Act, 1891, to his widow and daughter in the proportions of one-third and two-thirds respectively. Both executors duly proved the will and later died. The surviving executor died testate having appointed his nephew to be his executor, but the nephew ignored requests to prove his uncle's will. The testator's widow and daughter having agreed to sell the farm and being unable to make title thereto as it remained registered in the testator's name, an application was made to the court for a grant to the widow of letters of administration de bonis non under The Probates and Letters of Administration Act (Ireland), 1857, s. 78, or, alternatively, a grant ad colligenda bona to remain operative until the nephew proved his uncle's will.

Held, that the court had power to make a full grant to the applicant limited only until the nephew should obtain probate of his uncle's will.

MOTION by the widow of the testator for letters of administration with the will annexed.

The facts are summarised in the judgment of the Lord Chief Justice.

Jones for the applicant.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J.: James Gilkinson, the deceased in this matter, died at Drumshambo, Cookstown, on the 4th April, 1925, leaving his widow, Eleanor Jane Gilkinson, the present applicant, him surviving. The

(1) In the King's Bench Division (Probate) before Andrews L.C.J.

only child of his marriage, Elizabeth Ann, was born four days after his death. By his will, dated the 22nd March, 1925, the deceased, after making certain small bequests, left the residue of his estate, which included a farm of 11 acres, 3 roods, 30 perches at Drumshambo, registered in his name under the Local Registration of Title (Ireland) Act, 1891, to his wife and child in the proportions of one-third and two-thirds respectively. He appointed Robert Hopper and Richard Hopper as his executors, to whom probate of his said will was granted on the 15th September, 1925. Robert Hopper died on the 25th May, 1938, and Richard Hopper died on the 2nd May, 1940. The latter made his last will on the 4th March, 1940, by which he appointed his nephew Silas Black to be his executor. This will has not been proved, and all efforts to induce the said Silas Black to do so, and thereby complete the chain of executorship to the will of James Gilkinson, have failed. Likewise he has neglected to reply to a letter addressed to him by the applicant's solicitors inviting him, as an alternative, to renounce his right to probate of Richard Hopper's will. The applicant has of course no right to cite him to extract probate or to renounce, as she derives no interest under Richard Hopper's will.

The estate of James Gilkinson has not been fully administered ; and, in particular, the farm of land in Drumshambo already referred to remains registered in the name of the deceased. The applicant (with the consent of her daughter, who is now of age) has agreed to sell this farm to the applicant's brother ; but she is unable to change the name in the register or to make title to the farm without first obtaining a de bonis non grant to James Gilkinson's estate.

In these circumstances the application is made to me, on notice to Silas Black and his solicitor, for an order that the applicant be granted liberty to apply for a grant of letters of administration de bonis non, with will annexed, to the estate of the said James Gilkinson, either unconditionally or subject to such terms or conditions as to the Court may seem meet.

Mr. Jones, on the applicant's behalf, submitted in the first place that the case came within the section 78

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of The Probates and Letters of Administration Act (Ireland), 1857, under which the Court is empowered in certain specified events to appoint a person to be administrator other than the person who, if the Act had not been passed, would by law have been entitled to a grant. A perusal of the section, however, leaves no doubt in my mind that none of the events mentioned in the section, in which alone the jurisdiction arises, exists in the present case. The section, accordingly, is of no avail to the applicant.

Alternatively, Mr. Jones asked for a grant ad colligenda bona, the grant to remain operative until such time as Silas Black applied for and obtained a grant of probate to Richard Hopper's estate. He submitted that such a grant might be made in terms expressly conferring upon the grantee wide general powers including a power to sell the farm. In support of his argument he referred to Mortimer's Probate Law, (2nd ed.), p. 394, and to *In the Goods of Roberts* (1), and *In the Goods of Bolton* (2). These cases merely illustrate the indisputable jurisdiction of the Court to make ad colligenda bona grants where it is for the benefit of absent or unknown next of kin to do so. Such grants may be made to interested parties or even to entire strangers ; but they should be issued only in cases of emergency, and, in particular, for the purpose of preserving assets where the value or existence of the estate may be endangered by unavoidable delay in obtaining a full grant. Such grants do not authorise the distribution of assets.

After careful consideration I have come to the conclusion that there is no necessity to resort to such procedure in the present case, as I am of opinion that the Court has power to make a full grant to the applicant limited only until Silas Black, the executor of Richard Hopper, shall obtain probate of his testator's will. The precise point is dealt with by the learned editors of Tristram and Coote's Probate Practice (19th ed.) p. 85, where under the caption of " Chain in abeyance " it is stated that " When the only, or surviving proving " executor, has died, leaving a will and appointing an

(1) [1898] P. 149. (2) [1899] P. 186.

"executor, who for some reason does not prove his "testator's will, or renounce probate thereof, a grant "can be made, to a residuary legatee or a person "entitled of the unadministered estate of the original "deceased, without an order, limited until the executor "shall obtain probate of his testator's will." No doubt this view is expressed in a chapter of this authoritative textbook following a citation of section 7 of the Administration of Estates Act, 1925, dealing with the law as to the chain of executors, which Act does not apply to Northern Ireland. That section, however, I regard as merely declaratory of the law as previously existing both in England and Northern Ireland, at least in so far as it is relevant to the matter in issue in the present case. I shall, accordingly, make an order that liberty be granted to the applicant to apply for a grant of letters of administration de bonis non, with the will annexed, to the estate of James Gilkinson, limited until Silas Black, the executor named in Richard Hopper's will, shall obtain probate thereof. The applicant will have her costs out of the estate.

Solicitors for the applicant : *J. B. & R. H. Twigg.*

M. V. P.

K.B.D. (Matrimonial) 1947.

June 6, 23.

COOKE v. COOKE (1).

Divorce—Adultery—Condonation of adultery—Subsequent desertion for less than statutory period—Revival of condoned adultery.

A wife's adultery was condoned by the husband who forgave her and resumed cohabitation. Later the wife deserted the husband. The husband petitioned for divorce on the ground of the original adultery after the desertion had continued for six months.

Held, that desertion for this limited period was sufficient to revive the condoned adultery.

Beard v. Beard [1946] P. 8 approved.

PETITION for divorce by a husband against his wife on the ground of adultery.

The facts sufficiently appear in the judgment.

J. G. Fox for the petitioner.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J.: In this case the respondent committed adultery whilst her husband, who was a sergeant in the Royal Artillery, was on foreign service. As a result of such adulterous intercourse she gave birth to a female child on 4th October, 1945. The petitioner, who was demobilized on 3rd September, 1946, felt sorry for his wife, who was in bad health, and forgave her, resuming cohabitation with her at Plymouth. Unfortunately, however, the respondent's love for her husband had vanished. She could not tolerate his presence in their house, neglected all the wife's ordinary domestic duties, and told him she was not interested in his future and to get out of the house. He endeavoured to persuade her to accompany him to Northern Ireland, to which request she replied that she would not live with him any longer. The petitioner, accordingly, came to Belfast without her, and some months afterwards made another attempt towards reconciliation which was unequivocally rejected. In

(1) In the King's Bench Division (Matrimonial) before Andrews L.C.J.

the foregoing circumstances I have no hesitation in holding that the respondent has been guilty of desertion dating from the month of September last. The petition was filed on 14th March, 1947; and the only question which it remains for me to determine is whether such desertion for the limited period of approximately six months—an appreciably shorter time than the three years necessary to constitute a ground for divorce—is sufficient in law to revive the condoned adultery, and so warrant the pronouncing of a decree.

It must be admitted that it does not redound to the credit of the law that there should be any doubt upon such an issue ninety years after the passing of the English Matrimonial Causes Act, 1857; but recent authorities have disclosed a remarkable divergence of judicial opinion in England amongst the learned judges who have been exercising this matrimonial jurisdiction; and the decision of the English Court of Appeal in the most authoritative and one of the most recent cases—*Beard v. Beard* (1)—was only a majority decision, Vaisey J. dissenting from the judgments of Scott and Lawrence L.JJ. The Court by such majority upheld the opinion expressed by Pilcher J. in *Higgins v. Higgins and Bannister* (2), that desertion for less than three years is a matrimonial offence which revives condoned adultery—a decision which was to a great extent based upon a passage in the judgment of Merriman P. in *Jordan v. Jordan* (3), to the effect that desertion as a matrimonial offence can exist independently of its duration. In so holding the Court rejected the opinion of Hodson J., from whose decision the appeal in *Beard v. Beard* (1) had been taken, and also expressed disapproval of the decisions of Barnard J. in *Ainley v. Ainley* (4), and of Wallington J. in *Harrison v. Harrison* (5).

I have considered these cases and several earlier authorities with great care. I propose, however, to deal with the matter briefly, both because so much has been already said or written on the subject that I

(1) [1946] P. 8.
(2) [1943] P. 58.
(3) [1939] P.239, 251.
(4) [1945] P. 27.
(5) Unreported.

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ANDREWS L.C.J.

find it impossible to make any new and useful contribution, and also because I find myself in entire agreement with the opinion of Scott L.J., who, in *Beard's Case* (1) reviewed the law from the standpoint of regarding marriage as a status, and in doing so paid due regard to the decisions of the old ecclesiastical courts upon which our present statutory jurisdiction in divorce has been superimposed.

I should wish, however, to summarize in a few sentences my own opinion upon the law of condonation as it affects the present case, not hesitating to borrow, where convenient, the phraseology of Scott L.J. Condonation is not absolute but only conditional in character. It is a forgiveness which is subject to the implied condition that there will be no repetition of the matrimonial offence or commission of any unwarranted and substantial breach of matrimonial duty. It is only so long as this state exists that the bar of condonation continues. If there be a breach of such condition the right to a remedy for the condoned offence revives, and so enables the Court to base a decree of divorce upon it. It is not necessary that the new offence or breach of matrimonial duty, by whichever name it be called, should be of the same character as the former which was condoned. It may be any other marital offence which falls within the cognizance of the matrimonial court. Thus cruelty or desertion may revive condoned adultery. Neither is it necessary that the new matrimonial wrongdoing should be of the same strength or degree as the old, nor is it requisite that it should be the same gravity as the law would require as the foundation for a decree. Thus it would in my opinion be contrary to both good reason and established law that a wife who condoned such acts of cruelty on the part of her husband as would have entitled her to a decree of divorce, and who was immediately after reconcilation again subjected to unjustifiable ill-treatment, should be required before obtaining relief to submit to further acts of cruelty of like gravity to those in respect of which she had given her conditional forgiveness. Likewise, I am of opinion,

(1) [1946] P. 8.

basing my views in part, as did Scott L.J., upon the practice of the old ecclesiastical courts in suits for restitution of conjugal rights, that the matrimonial offence of "desertion" may be committed irrespectively of its duration if it be of sufficient reality for the court to take cognizance of it; though, of course, it is only when it has continued for a period of at least three years immediately preceding the presentation of the petition that it constitutes a sufficient ground in itself for divorce under section 2 (*b*) of our Matrimonial Causes Act (Northern Ireland), 1939. In truth it is a serious matrimonial offence though it has not continued for the prescribed statutory period. And so it is that magistrates have jurisdiction to make maintenance decrees consequent upon the commission of the matrimonial offence of desertion, though but a small part of the statutory period requisite for a decree of divorce may have elapsed.

In conclusion, I would respectfully adopt the words of Scott L.J. in defining a "matrimonial" or "marital "offence within the cognizance of the Divorce Court" as simply meaning "conduct which in the eye of that "court is wrong, whether it does or does not reach the "duration, or gravity, or completeness which is "necessary to permit of a decree, provided always "that it be sufficiently serious for the court to regard "it as a substantial breach of duty" (1).

I cannot but think that to hold otherwise than as I have indicated would be completely destructive of this well-recognised doctrine of "revival"; it would certainly, to use Scott L.J.'s words, deprive it of any practical value; for, if the new acts constituting such revival had in themselves to be such in character, degree or duration as would warrant the making of a decree, there would be no necessity whatever for a petitioner to call in aid the earlier condoned acts when seeking relief.

Acting upon the principles which I have enunciated I grant the petitioner a decree.

Solicitor for the petitioner: *L. I. G. Fox.*

J. McC.

(1) [1946] P. 8, 22.

K.B.D.
1947.

Dec. 10.

1948.

Feb. 6.

McELROY v. LEONARD (1).

Landlord and tenant—Rent Restrictions Acts—Recovery of possession —"Greater hardship"—Relevant matters for consideration—Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940 (4 & 5 Geo. 6, c. 7), s. 8 (1) (e) (ii).

A landlord sought possession of a dwelling-house, occupied by a tenant and his family for twenty years and to which the Rent Restrictions Acts applied, for H. who was a person engaged in the landlord's whole time employment. H. occupied rent free a house belonging to R. who needed it for an agricultural worker employed by R.

When determining, pursuant to the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940, section 8 (1) (*e*) (ii), whether greater hardship would be caused by refusing to grant the order than by granting it, the county court judge considered (i) the personal hardship to the landlord ; (ii) the hardship to H. in having to travel daily a considerable distance to and from his work and the insecurity of tenure of the house which he occupied ; (iii) the hardship to H.'s child, aged 11 years, who had to travel two miles to school ; and (iv) the hardship to R. who needed for his employee the house occupied by H. ; and he gave a decree for possession.

Held, that the county court judge was entitled to consider the hardship to the landlord, the hardship to H., and the hardship to H.'s child ; but that the hardship, if any, to R. was irrelevant.

Harte v. Frampton [1948] K.B. 73 approved and followed.

Cooley v. Walsh [1926] I.R. 239 not followed.

CASE STATED by the Deputy Recorder of Londonderry.

At Londonderry Petty Sessions on the 26th September, 1946, the complainant William John McElroy (hereinafter called " the landlord ") proceeded by summons against the defendant James Leonard (hereinafter called " the tenant ") for delivery by the tenant to the landlord of possession of a dwelling-house and premises at Waterside in the City of Londonderry, which the tenant was alleged to hold from the landlord at a rent of 5*s*. 4*d*. per week and in respect of which notice to quit was alleged to have been served. The resident magistrate dismissed the summons on

(1) In the King's Bench Division before Andrews L.C.J. and Babington L.J.

the merits. The landlord served notice of appeal from this dismiss and the appeal was heard at the Quarter Sessions for the City of Londonderry on the 7th January, 1947. The following facts were found by the Deputy Recorder :—

(*a*) The dwelling-house of which possession was sought was held by the tenant as tenant from week to week under a written agreement dated the 22nd April, 1927, and under which he was paying rent to the landlord, and the dwelling-house was at all material times a dwelling-house within the Rent Restrictions Acts (Northern Ireland), 1920-1944.

(*b*) The weekly tenancy was determined by a notice to quit dated the 5th September, 1946, and the tenancy determined on the 16th September, 1946.

(*c*) The tenant resided in the said dwelling-house with his wife and two children aged 18 years and 16 years.

(*d*) The landlord was a farmer and dairyman at Rossdowney House situated about one hundred yards from the said dwelling-house. The landlord owned and farmed 180 acres, and had taken 120 acres on a conacre letting. He kept 76 milch cows, 25 other cattle, and 5 horses.

(*e*) The landlord had in his whole time employment a byreman named Heatherington who resided with his family at Ballyowen, about one and a half miles from Rossdowney House. The house occupied by Heatherington at Ballyowen was owned by a Mr. Ross who had allowed Heatherington into possession on the 22nd February, 1946, in order to oblige the landlord until such time as the landlord could obtain possession of the dwelling-house occupied by the tenant. No rent was paid to Mr. Ross for Heatherington's occupation of this house. Mr. Ross required possession of the house occupied by Heatherington for a farm labourer whom he employed, but he had taken no steps towards obtaining possession other than indicating that he wished to have it.

(*f*) The landlord had to carry on the supervision of the cows and other cattle with the assistance of

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McELROY v. LEONARD.

Heatherington only; and by reason of the fact that Heatherington lived at Ballyowen the landlord was obliged to be at home every night because he had no one to relieve him in attending the animals when necessary. The landlord was also obliged to start work himself early in the morning to prepare for the milking because Heatherington was unable to reach Rossdowney House sufficiently early. If Heatherington were in the house occupied by the tenant he would be able to share night work with the landlord and would be at his work earlier in the morning.

(*g*) Heatherington was engaged in work necessary for the proper working of an agricultural holding.

(*h*) Heatherington had three children aged 11 years, 5 years, and 18 months. The eldest child had to travel two miles to school each day. There was a suitable school convenient to the house occupied by the tenant.

(*i*) No alternative accommodation was offered by the landlord to the tenant. The tenant had tried unsuccessfully to get alternative accommodation.

The Deputy Recorder was satisfied that the dwelling-house was required by the landlord for the occupation of a person engaged on work necessary for the proper working of an agricultural holding, that greater hardship would be caused by refusing to grant the order for possession than by granting it, and he considered it reasonable to make the order.

In considering the question of hardship he took into account :—

(i) The hardship caused to the landlord in having no person to relieve him after working hours each evening and at week-ends, and in the early morning.

(ii) The hardship caused to Heatherington in having to travel some distance to his work twice a day.

(iii) The hardship caused to Heatherington's child in being two miles further from school, though he attached little, if any, weight to this consideration.

(iv) The hardship caused to Mr. Ross in having a house which he required for occupation by an agricultural worker of his own occupied without rent by Heatherington.

He weighed the above matters against the hardship which would be caused to the tenant and his family if the order were made. He expressed the view that the hardship was about equal, but considered that the balance of hardship lay with the landlord.

The questions for the opinion of the court was whether the Deputy Recorder was right in dealing with the question of greater hardship as affecting the landlord in considering :—

(*a*) the position of the landlord ;
(*b*) the position of Heatherington ;
(*c*) the position of Heatherington's family ;
(*d*) the position of Mr. Ross.

If the Deputy Recorder was entitled to consider only the relative hardship caused to the landlord and the tenant and their respective families he would have affirmed the decision of the resident magistrate.

Conaghan for the tenant (appellant).

Gibson for the landlord (respondent).

Cur. adv. vult.

The judgment of the court was delivered by :

ANDREWS L.C.J.

ANDREWS L.C.J. : The only question which arises for our determination is the width of meaning to be assigned to the words " greater hardship " in section 8 (1) (*e*) (ii) of the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940. Is it the duty of the court in determining the issue of " greater " hardship " to have regard only to the hardship which would be caused to the landlord or tenant by refusing to grant or by granting the order ? Or is it within the province of the court also to take into consideration the hardship which would be caused to others, such, for example, as in the present case the person in the employment of the landlord whom he proposed to make his tenant ?

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We propose in the first place to examine the terms of the statute itself and afterwards to consider the authorities. The term "greater hardship" occurs, and only occurs, in a sub-clause of section 8 (1) (*e*) of the Act of 1940. Section 8 (1) provides that no order or judgment for the recovery of possession of any dwelling-house to which Part 2 of the Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless the facts of the case bring it within one or other of the several alternatives mentioned in clauses (*a*) to (*i*). The present case, it is contended, falls within clause (*e*), which provides for the recovery of a dwelling-house required by the landlord for occupation as a residence for himself, or for his father or mother, or for any son or daughter of his over eighteen years of age, or for any person bona fide residing with him, or (and these are the important words in the present case) *for some person engaged in his whole time employment*, or otherwise as therein mentioned, the court having to be satisfied (*inter alia*) that "greater hardship would be caused by refusing "to grant the order or judgment for possession than "by granting it." Section 8 (2), which provides that in certain specified cases the existence of alternative accommodation shall not be a condition of an order or judgment on any of the grounds specified in paragraph (*e*) of sub-section (1) has also, in our opinion, a bearing on our enquiry, including, as it does, in clause (*b*) a case such as the present, namely, "where the court is "satisfied that the dwelling-house is required by the "landlord for the occupation of a person engaged on "work necessary for the proper working of an agricul-"tural holding." This sub-section clearly indicates the intention of the legislature to facilitate a landlord in the housing of his agricultural workers; and, thus directly connected, as this latter sub-section is, with section 8 (1) (*e*), we find at least some indication that the term "greater hardship" where it occurs in section 8 (1) (*e*) (ii) should receive a sufficiently wide interpretation to include consideration of the interests and convenience of such a worker.

Turning now to the case law on the subject, in our

opinion a strong line of authority has recently been established, with which we express our respectful approval, in favour of such liberal interpretation. We do not wish to do more than merely mention *Cumming v. Danson* (1), to which we were referred in argument, as we agree with Mr. Conaghan that that case was decided on the question of "reasonableness" rather than of "greater hardship." However, in *Baker v. Lewis* (2), the English Court of Appeal, affirming on this point the decision of the county court judge, held that in considering the question of "greater hardship" the court can take into account the fact that the landlord desires to have living in his house persons who have been previously living with him, in addition to his sons or daughters or parents, who are the only classes of persons who are specifically referred to in paragraph (*h*) of the First Schedule to the British Act of 1933 as persons for the residence of whom the landlord may recover possession of his dwelling-house. Parenthetically, we should say that this paragraph (*h*) corresponds to, but is distinctly narrower in scope than sub-section 8 (1) (*e*) of the Northern Ireland Act of 1940. The persons so living with the landlords in *Baker v. Lewis* (2) were apparently not members of their family; and, whilst it is clear that the landlords could not have brought the case within paragraph (*h*) if they had "required" the dwelling-house solely for occupation by the persons so living with them, yet, if they required it, as they did, as a residence for themselves, the court was entitled to take into consideration the fact that there were such other persons residing with them "whom they did not wish to turn into "the street." The court, accordingly, held that their position might be thrown into the scale when weighing the comparative hardship of landlord and tenant under the section.

We must also refer to two other cases which were apparently heard together by the English Court of Appeal as recently as last October. The first of the cases is *Rhodes v. Cornford* (3), in which it was held that

(1) [1942] 2 All. E. R. 653.
(2) [1947] K.B. 186.
(3) [1947] 2 All. E. R. 601.

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in considering "hardship" in relation to paragraph (*h*) (i.e., of the British Act) it was relevant to consider not only the hardship suffered by the landlord, but also the hardship suffered by the landlord's daughter who lived with her and upon whom she was dependent; and, accordingly, that in excluding such consideration the county court judge had misdirected himself in dealing with the issue of comparative hardship.

The judgment in the second of the two cases—*Harte & Another v. Frampton* (1) was delivered by Asquith L.J. The subject-matter of the proceedings was a bungalow, which the plaintiffs, or one of them, had let to the tenant, who, when his wife died, took his married daughter, her husband and their child to live with him. It was apparently admitted that these parties were not financially dependent on the tenant. It was held that in making the comparative computation of hardship it was relevant or permissible for the judge to consider not merely hardship to the tenant or landlord personally, but also hardship to the persons residing with them—persons who in law must really be regarded as third parties. Such "reflected hardship," as it is called, is not confined, as the landlord's counsel contended, to the case of dependants. The court refused to attempt to define classes, hardship to whom, and to whom alone, can be taken into account. The true view, said the learned Lord Justice, was that "the "county court judge should take into account hardship "to all who may be affected by the grant or refusal of "an order for possession—relatives, dependants, "lodgers, guests, and the stranger within the gates— "but should weigh such hardship with due regard to "the status of the persons affected and their 'proximity' "to the tenant or landlord, and the extent to which, "consequently, hardship to them would be hardship to "him. The inability to take in a guest for the week-"end would no doubt be assessed by the judge at nil. "The extrusion of a loved and trusted relation, whether "dependent or not, would weigh heavily in the scales."

In our opinion the view thus expressed is not only reasonable but it places the test of hardship upon an

(1) [1948] K.B. 73.

intelligible and sound basis. If the legislature had intended that the issue of comparative hardship was to be determined by the personal considerations of the landlord and tenant alone one would have expected that it would have said so in express terms, but it did not. The issue raised by the statute is in perfectly general terms—"whether greater hardship would be "caused by refusing to grant the order than by "granting it." In considering the question it must always be borne in mind that the issue only properly arises in connection with proceedings for the recovery of possession of a dwelling-house for the occupation of one or other of the persons specified in sub-section 8 (1) (*e*) of our Northern Ireland Act; and, accordingly, in our opinion, hardship to any such specified person by the refusal to grant the order for possession should naturally be a matter of considerable importance to the court. In this connection we would call attention to the fact that sub-section 8 (1) (*e*) of our Act of 1940, differs from the corresponding clause (*h*) of the First Schedule of the British Act of 1933 in that it expressly designates "any person bona fide residing" with the landlord, or any "person engaged in his "whole time employment," etc., as persons for whose residence the landlord may recover possession under this "greater hardship" section. For this reason we would hold that the term "greater hardship" might reasonably be given a wider rather than a narrower interpretation than that which it has received in England, so as to include the consideration of hardship to any of the additional persons so specified. The weight to be attached to the position of a whole-time employee and, consequently, to any hardship which he may suffer by the court's refusal to grant an order for possession, is possibly even greater when, as in the present case, that employee is "engaged on work "necessary for the proper working of an agricultural "holding"; for the legislature has in section 8 (2) (*b*) of the Act of 1940, to which we have already referred, recognised the great importance of a landlord recovering possession of any dwelling-house of his for the occupation of such an employee by dispensing in such a case

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with the necessity for the landlord to establish the existence of alternative accommodation as a condition of his obtaining an order for possession.

One case, and we think, only one—*Cooley v. Walsh* (1)—can be cited for the proposition that it is only hardship to the parties to the lease which can be considered. This court is not bound by that decision any more than was the English Court of Appeal in *Harte & Another v. Frampton* (2), and, like that court, we find ourselves unable to accept a limitation in regard to this issue of hardship which appears arbitrary and is certainly not expressly provided for in the statute.

Such being the law, as we conceive it and as we hold it to be, it only remains to apply it to the facts of this case. Clearly the Deputy Recorder was right in taking into account the personal hardship to the appellant (i.e., the landlord) to which he refers. He was also entitled to weigh in the balance the hardship to the appellant's employee, Heatherington, in having to travel a substantial distance to and from his work twice a day. The hardship to Heatherington's child in her attendance at school could not be wholly ruled out as irrelevant, for she lived with her father and suffered in this way a hardship corresponding to his; but in our opinion the Deputy Recorder rightly "attached little if any weight to this consideration."

Lastly, there was the alleged hardship to Mr. Ross, in whose house Heatherington at present resides free of rent, and who requires such house for the occupation of an agricultural worker of his own. In our opinion this alleged hardship to Ross is so indirect and remote that, even if it could be lawfully entertained, which we think it should not be, we should assess its value as nil. He is not even a "stranger within the gates."

We were not satisfied as to the weight given to this last item of hardship by the Deputy Recorder. If he had qualified the hardship caused to Mr. Ross in the same way as he did the hardship to Heatherington's child we might have been able simply to ignore this consideration altogether, and uphold his decision on

(1) [1926] I.R. 239. (2) [1948] K.B. 73.

the first three items of hardship. However, it appears to us that the same conclusion may properly be arrived at by the consideration that the hardship caused to Mr. Ross cannot properly be said to be a hardship in law; for Mr. Ross could have ejected Heatherington—a mere permissive occupant—at any time, and so determined such hardship. In truth the hardship connected with Heatherington's occupation of Mr. Ross's house, if there be any, attaches to Heatherington and not to Ross by reason of Heatherington's insecurity of tenure. This is a hardship which we think the Deputy Recorder could have taken into account, though perhaps less weight should be attached to it than to Heatherington's other hardships, because Heatherington has not yet been turned out of the house.

In the circumstances we thought it right to ask the Deputy Recorder whether his decision was dependent on the hardship to Mr. Ross being taken into account, and he informed us that in considering this item he also took into account the possibility of Ross resuming possession of the house, and the hardship which thus might, in the future, be caused to Heatherington.

In our opinion this puts the hardship arising from the relationship between Ross and Heatherington on its proper legal basis, and maintains the balance of hardship arrived at by the Deputy Recorder, even though we reject the hardship caused to Mr. Ross.

The answers to question (*a*), (*b*) and (*c*) submitted to us will be in the affirmative, and to question (*d*) in the negative. The decision of the Deputy Recorder granting a decree for possession will stand; and we shall allow the plaintiff his costs of this case stated measured at fifteen guineas.

Appeal dismissed.

Solicitors for the appellant: *H. C. O'Doherty & Son.*

Solicitors for the respondent: *David Wilson & Co.*

M. V. P.

K.B.D. (Matrimonial) 1947.

Nov. 27.

1948.

Jan. 16, 19; Feb. 6, 24.

WARD v. WARD (1).

Divorce—Cruelty—Whether malignity a necessary ingredient.

Malignity is not an essential ingredient in the matrimonial offence of cruelty.

Squire v. Squire [1947] 2 All. E. R. 529 disapproved and not followed.

PETITION for divorce by a wife against her husband on the ground of cruelty.

The petition set out particulars of cruelty extending over a long period including assaults, beatings, threats to murder, the use of coarse and abusive language, and teaching the infant child of the marriage to apply indecent epithets to his mother. The case is reported only on the issue raised by paragraph 7 (*e*) of the petition in which the petitioner alleged that the respondent inserted into the petitioner's vagina a quantity of tobacco which became lodged in her uterus causing her pain and suffering.

According to the respondent's evidence he introduced a plug of tobacco into a rubber contraceptive sheath for the purpose of prolonging the act of copulation. When the sheath broke the tobacco passed into the petitioner's vagina, and further sexual intercourse on the same occasion drove it into contact with the orifice of the uterus where it remained for four days setting up an inflammatory condition until extracted by a gynaecologist.

It was contended for the respondent that the introduction of the tobacco into the petitioner's vagina was a mere accident which was neither deliberate nor malignant, and that both intention and malignancy are ingredients of legal cruelty.

Reid for the petitioner.

Gibson for the respondent.

Cur. adv. vult.

(1) In the King's Bench Division (Matrimonial) before Porter L.J.

PORTER L.J. [after setting out the facts and holding that the other charges had been proved and would justify granting the relief sought continued :] I shall now proceed to examine the tobacco incident which has taken such a prominent place in this case and which the respondent says was a mere accident, an unlooked for mishap, an unfortunate occurrence which was neither deliberate nor malignant nor intended, and his counsel contends that both malignancy and intention are ingredients of legal cruelty.

For this proposition I am referred to a judgment of Mr. Justice Finnemore in *Squire v. Squire* (1). The facts of that case were as follows :—A wife who had been suffering four years from constant and severe insomnia as a result of illnesses and severe operations insisted on her husband reading her to sleep every night, and made other demands upon him and nagged him with the result that his health was affected and his efficiency in his profession was impaired. He sued for a divorce on the ground of legal cruelty alleging that his wife had deliberately and maliciously and sadistically stopped him from sleeping. Finnemore J. holding that there was no legal cruelty said that she did not deliberately set out from spite to her husband, to hurt him or to prevent him sleeping as she could not, and that it was because of the wife's illness that life became impossible for them. Referring to the cases on the subject he says : " All those cases emphasize, as " I think all the cases before 1937 laid down the fact " that cruelty must be *deliberate, malignant* and " *intended.*"

Counsel for the respondent also relied upon a decision of Henn Collins J., in *Astle v. Astle* (2). A husband three weeks after his marriage commenced a series of murderous assaults upon his wife and others, and being certified to be insane, was received into a

(1) [1947] 2 All. E. R. 529. (2) [1939] P. 415.

[NOTE :—The decision of Finnemore J. in *Squire v. Squire* has since been reversed by the Court of Appeal in England (Tucker and Evershed L.JJ. and Hodson J.) who held that to constitute cruelty it was not necessary that there should be intention or malignity : see [1948] W.N. 202.—EDITOR.]

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PORTER L.J.

mental hospital suffering from acute mania. His condition improved and he was let out on parole from time to time. On one occasion he told his wife he would kill her and commit suicide. She wisely pretended to agree with him and persuaded him to return to the hospital. After his discharge he came to her house and threatened violence to her and her family and caused her such apprehension that she was obliged to seek police protection.

It was held that after his discharge he knew what he was doing, and although it was an isolated act of cruelty, with her past experience the threat had a reality and a force out of all proportion to what it would have had if he had not already made attempts upon her life.

"The respondent," Henn Collins J. said, "did not "know the nature and quality of the acts which he com- "mitted in the year 1927, and, if these acts stood alone "the petitioner could not get relief, since in my "judgment intention or malignity is an essential "ingredient in cruelty." Taking the earlier history into account, however, he held that the husband was responsible for the consequences of the later threat. I think that what the judge meant was that there can be no legal cruelty without *either intention* or *malignity*. He did not say that *malignity* was essential. Is malignity an essential ingredient of legal cruelty? In the Laws of England (Halsbury, ed. Vol. 16, p. 473, 474, and Hailsham ed. Vol. 10, p. 649) cruelty is defined as conduct of such a character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger.

That was the principle laid down by Lord Stowell in 1790 in the leading case of *Evans v. Evans* (1), adopted by Lopes and Lindley L.JJ., in the Court of Appeal in *Russell v. Russell* (2), and reiterated by the majority of the Law Lords when that case was appealed (2). It should be observed that a substantial minority of the law lords (Lords Halsbury, Hobhouse,

(1) (1790) 1 Hag. Cons. 35. (2) [1895] P. 315; [1897] A.C. 395.

Ashbourne and Morris) held that it was not essential to prove danger or apprehended danger to life, limb or health and that a wife who made a false charge of an unnatural offence against her husband and who persisted in and published the charge to the world after she did not believe in its truth was guilty of legal cruelty.

I refer to this minority opinion because it shews that in recent years there has been a tendency to widen and extend the principle so as to apply to conduct which would not have been deemed legal cruelty in the days when a wife was regarded as a species of chattel in the possession of her husband who was also her lord and master.

One of the best examples is to be found in *Atkins v. Atkins*, a decision of Henn Collins J. (1), where a husband sought a divorce on the ground that the constant nagging of his wife over a period of years had seriously injured his health. No act of violence was alleged or anticipated, yet it was held (and I think rightly too) that the wife's nagging had become completely intolerable and that as a consequence the husband's health had been seriously endangered.

Malignity imports a condition of virulent hatred or hostility ; but apart from the decision of Finnemore J. (if he is rightly reported, which I doubt) there is no case that I am aware of which says or even suggests that malignity is a necessary ingredient of legal cruelty, and there is direct and weighty authority to the contrary.

In *Kirkman v. Kirkman* (2), a suit for judicial separation by a husband on account of violent and outrageous treatment by his wife which endangered his safety, it was alleged that her conduct was caused by her jealousy of her husband. Sir William Scott (afterwards Lord Stowell) holding that there was no foundations for her feelings of jealousy, said that if the husband's safety was "endangered by violent and "disorderly affections of the mind, it is the same in "its effects as if it proceeded from mere malignity "alone ; it cannot be necessary that, in order to obtain

(1) [1942] 2 All. E. R. 637. (2) (1807) 1 Hag. Cons. 409.

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"the protection of the Court, it should be made to "appear to proceed from malignity."

Intention there must be in the legal sense, that is to say, that a person who wilfully performs an act or persists in a course of conduct is deemed to intend the natural and probable consequences, and must be held responsible for them although such a result may never have occurred to his mind. For example in *Boardman v. Boardman* (1), a wife petitioned for divorce on the ground of adultery and cruelty and alleged that the respondent knowing that he was suffering from a venereal disease married her and infected her with the disease. Sir Cresswell Cresswell repeated the words of Dr. Lushington in *Ciocci v. Ciocci* (2): "If "this were a point necessary to be determined, I "should hold, and without doubt, that if a man "married under such circumstances and communi- "cated to his wife the venereal disease, it was, to use "the mildest term applicable to such conduct, *such* "*utter recklessness of the health and comfort of his wife*, "that if he did communicate such disease he was guilty "of cruelty in the eye of the law; and I should hold "this on the principle that whoever does an act likely "to produce injury and the injury follows, can never "excuse himself by saying that he hoped a probable "consequence might by some peculiar good fortune, "not follow."

In *Jones v. Jones* (3), the full court adopted the principle which Dr. Lushington had laid down. The cases on the subject were examined by Sir Samuel Evans in *Browning v. Browning* (4), where he held that in order to establish a charge of legal cruelty for communicating a venereal disease to the wife it is not necessary to allege or prove that the husband *knowingly* or *wilfully* or *recklessly* communicated the disease and that the onus was upon him to prove that the communication of the disease did not amount to legal cruelty.

I have no hesitation in saying that the proposition

(1) (1866) L. R. 1 P. & D. 233.
(2) (1854) 1 Ecc. & Ad. 121.
(3) (1860) Searle & Smith Rep. 138.
(4) [1911] P. 161.

that malignity is a necessary ingredient of legal cruelty is not the law.

[His Lordship then considered the evidence relating to the circumstances in which the tobacco was introduced into the petitioner's vagina and concluded :]

The introduction of the tobacco into the vagina was a deliberate act even though it was contained in a rubber sheath. It was the respondent's act that drove it further where it probably came into contact with the orifice of the uterus. He might have told her or warned her at the time, but he says he had no intention to harm her and he allowed the poisonous substance to remain in the vagina, because he thought, forsooth, that it would come away.

I hold that the principle enunciated by Sir Creswell Creswell in *Boardman v. Boardman* (1) applies precisely to these facts, and the respondent cannot excuse himself by saying that he expected that the ordinary and probable consequences would not follow ; and his conduct in this matter amounts to legal cruelty of a most disgusting kind.

Solicitors for the petitioner : *Carson, Baillie, Johnston & Thom.*

Solicitors for the respondent : *S. & R. Crymble.*

J. McC.

(1) (1866) L. R. 1 P. & D. 233.

K.B.D. 1947.

DELANEY v. JOHN EASTWOOD & SONS, LTD. (1).

June 27; July 28.

Practice—Separate trial of issue—R.S.C. Order xxxvi, r. 8.

In an action by a workman against his employer for damages for personal injuries the question whether the workman has elected to claim compensation under the Workmen's Compensation Acts is not one on which the court will in its discretion direct an issue to be tried under Order xxxvi, r. 8.

The court will only exercise its discretion to order an issue to be tried under Order xxxvi, r. 8, where there is a strong probability that by making such order the action will be determined more expeditiously and at less cost and inconvenience to the parties.

MOTION by the defendants for an order (1) that the action be dismissed, or, alternatively, stayed on the ground that the plaintiff had elected to claim compensation under the Workmen's Compensation Acts, and that accordingly the action could not be maintained; and (2) that, if necessary, an issue be tried prior to the trial as to whether the plaintiff had exercised his option under section 29 of the Workmen's Compensation Act (Northern Ireland), 1927, to claim compensation under the Workmen's Compensation Acts, and that all other proceedings be stayed pending the trial of such issue.

The facts of the case and arguments of counsel, all of which were directed to the second part of the notice, sufficiently appear from the judgment.

Sheil K.C. and *Jones* for the defendants, in support of the motion.

Stewart for the plaintiff.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J.: The plaintiff's claim in this action is for damages for personal injuries and loss sustained by the plaintiff by reason of the alleged negligence of the defendants in their business as demolishers. The accident occurred on the 18th July, 1945, when the plaintiff was employed by the defendants as a steel-

(1) In the King's Bench Division before Andrews L.C.J.

fixer and bender. Compensation under the Workmen's Compensation Acts was paid by the defendants to the plaintiff covering the entire period from the 18th July, 1945, to the 2nd January, 1947, receipts for all such payments being signed for either by the plaintiff personally or by his wife. The defendants allege that the plaintiff continued to claim and to accept such compensation for a period of twelve and a half months after he first consulted his solicitor. The plaintiff admits that either he or his wife received weekly payments ; but says that at no time did he sign other than a bare receipt, and that at no time did the defendants explain to him that by receiving these sums he was barring his right to proceed at common law. Likewise he says that his wife informed him that at no time was the form of receipt read out to her, or did she understand that by accepting or signing receipts she was barring his claim at common law.

All receipts were given by signatures on a printed form supplied by the defendants' Insurance Company. The opening words of this form authorised the payment to the plaintiff of £2 a week, which, when supplementary allowance was added in November, 1945, became £2 10*s*. 0*d*. a week. Underneath this authorisation, and immediately before the space reserved for the weekly payments and signatures, there came the form of receipt as follows :—

" Received from J. Eastwood and Sons Ltd. the
" following sums under the Workmen's Compensa-
" tion Acts 1925/41 in respect of an accident sus-
" tained by me on the 18th day of July, 1945.

" Signed .....

" I have read this Form of Receipt to the claimant
" and witnessed his signature thereto.

" Signed ....."

Not wishing to pre-judge in any way an issue which will have to be determined at a later stage of this action, I shall content myself with merely saying that the unsigned, and therefore incomplete, character of this form of receipt lends some support to the plaintiff's statement as set out above ; and it is also important to observe that the form of receipt only appears on

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the first sheet, on which all the signatures were those of his wife, "M. Delaney." This first sheet covers all payments made up to and including the 8th March, 1946; and, in fact, it was not until the 31st May, 1946, that the plaintiff himself first signed for any payment. On the other hand, it would also appear that on the 7th August, 1945, the applicant signed a Declaration claiming supplementary allowances under the Northern Ireland Workmen's Compensation Acts of 1940 and 1943.

Nothing, however, that I have stated is necessarily conclusive either in favour of or against the plaintiff's case. The judge or jury who ultimately determine the matter may or may not be satisfied on the whole evidence that, with full knowledge and appreciation of his alternative rights at common law and under the Workmen's Compensation Acts, the plaintiff accepted the payments under the Acts, and thereby irrevocably exercised his statutory option. This is a matter upon which, I repeat, the evidence before me is not necessarily conclusive. See *Young v. Bristol Aeroplane Co. Ltd.* (1), *Moran v. Howard* (2), and *Leathley v. John Fowler & Co. Ltd.* (3).

The application that an issue should be directed is made under Order 36, r. 8, under which "a court or "judge may at any time order . . . that one or more "questions of fact be tried before the others." It is clear that the court or judge in making such an order is exercising a purely discretionary power; and in my opinion the onus of satisfying the court or judge lies upon the party, be he plaintiff or defendant, who seeks the order. The question to be determined in each case is in general terms whether it would be in the interests of justice that the order should be made. In my opinion if there is a strong probability (not a mere possibility) that by making such an order the action would be determined more expeditiously and at less cost and inconvenience to the parties, and if, on the special facts of the case, there is no strong reason to the contrary, it would be proper that the jurisdiction

(1) [1946] A.C. 163.
(2) [1945] N.I. 131.
(3) [1946] K.B. 579.

should be exercised. If, on the other hand, there is no such probability, it would appear to me to be entirely wrong for the court to take a course which would break up the issues, and which, by reason of two separate trials, would cause delay and prejudice by materially increasing the burden of costs.

I have read all the cases cited, which, I consider, fully bear out the opinion which I have expressed. It is clear from a perusal of them that such an order as is now sought is never made as of course. In *Emma Silver Mining Co. v. Grant* (1), the court, on the plaintiff's application, made an order directing two simple issues, which in substance were only one, to be tried as between the plaintiffs and two of the defendants before the rest of the action, the plaintiffs giving an important undertaking not to seek relief against the said two defendants in respect of any cause of action other than that covered by the issues so to be tried, and also discontinuing such portion of the action as the court should direct. In the course of his judgment Jessel M.R. (2), having referred to the discretion under the rule as being general and of course judicial in character, continued: "In a case "of this kind my opinion is that the judge must have "some evidence which will make it at least probable "that the issue will put an end to the action. The "Plaintiff is not to be harassed at the instance of the "Defendant by a series of trials, each trial taking "issue on every link of the Plaintiff's case. That is "not the meaning of the rule as I understand it, but "it may properly be applied in such a case as that I have "stated, where the Judge has serious reason to believe "that the trial of the issue will put an end to the "action." At p. 930 the learned Judge added it as his opinion that "the case to be brought within the "rule ought to be one of simple issues." *Piercy v. Young* (3) was a case in which a defendant in a partnership action, who set up a counterclaim in which he alleged an agreement by the plaintiff for the sale to the defendant of his (the plaintiff's) interest in the partner-

(1) (1879) 11 Ch. D. 918.
(2) *ibid* 926, 927.
(3) (1880) 15 Ch. D. 475.

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ship, applied to the court that the issue so raised should be tried before the other issues in the action. It was a courageous—I might almost say an audacious —application, for the granting of the order sought would have taken away the conduct of the cause from the plaintiff. In refusing the application the same learned judge (Jessel M.R.) said that the rule was intended to be applied to the class of cases which he had mentioned in his judgment in *Emma Silver Mining Co. v. Grant* (1) which, he added, he might call "ex- "ceptional cases." Later in his judgment he refers to them as "extraordinary and exceptional cases."

I am not aware of any case in which the principle so enunicated in the *Emma Silver Mining Co. v. Grant* (1) and *Piercy v. Young* (2) cases has ever been departed from or disapproved of. On the other hand, I find it expressly re-affirmed by McCardie J. in *Myers v. Myers, Carpendale, Radford and Thom* (3), where the learned judge, so distinguished, if I may say so, for his intimate knowledge of case law, said : "I agree that "no such order should be made save in exceptional "circumstances, and I respectfully adopt the observa- "tions upon the point by Jessel M.R. in *Piercy v.* "*Young*" (2).

Mr. Jones for the defendants referred me to *Smith & Co. v. Hargrove & Co.* (4), in which it was held that where liability and also the amount of damages are disputed in an action, and the question as to the amount of damages is one of such detail or nature that it probably will be referred to some other tribunal than a jury, it is a proper exercise of discretion under Order 36, r. 8, to order the question of damages to be postponed until later. In my opinion that case is entirely different from the present, and does not assist the defendants, especially when one notes the words of Pollock B. in the second sentence of his judgment at p. 184 :—"I entirely agree," he says, "with what "has been said by Mr. Kennedy, that this Court or "any Court ought to act with great caution before they "divide piecemeal different issues to be tried in a cause,

(1) (1879) 11 Ch. D. 918.
(2) (1880) 15 Ch. D. 475.
(3) [1918] P. 260, 263.
(4) (1885) 16 Q.B.D. 183.

"and it is to such cases that the remarks made by "the late Master of the Rolls in *Piercy v. Young* (1), "and one or two other cases also, are applicable."

Counsel has also referred me to the words of Viscount Simon in *Young v. Bristol Aeroplane Co. Ltd.* (2), in which the noble Lord, speaking of the prohibition of double process contained in section 29 (1) of the English Workmen's Compensation Act, 1925, says that it was presumably inserted for the protection of the employer, so that he shall not be vexed with both demands concurrently, and adds that "the protection "so given him could in proper cases be secured by stay "or injunction." Accepting this dictum, as I, of course, most respectfully do, and appreciating, as I have no doubt, that it was these words which inspired the present notice of motion, I am of opinion that this is not such a "proper case" as the noble Lord refers to, in which I ought to make an order in either of the alternative forms in which it is sought.

For all these reasons I express my approval of the practice note upon Order 36, r. 8, which will be found at page 533 of Wylie's Judicature Acts ed. 1906, and dismiss the motion with costs.

Motion dismissed.

Solicitors for the defendants: *McKinty & Wright.*

Solicitor for the plaintiff: *D. P. Marrinan.*

J. McC.

(1) [1880] 15 Ch. D. 475. (2) [1946] A. C. 163, 172.

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McCAUSLAND AND OTHERS v. YOUNG AND OTHERS (1).

June 12, 13, 14, 17, 19, 20, 21, 24; July 29, 30, 31.

1948.

Settlement—Condition subsequent—Forfeiture clause—"Become a "Roman Catholic or profess that he or she is of the Roman "Catholic religion"—Uncertainty—Infant—Parental duty—Public policy.

Feb. 18.

Family arrangement—Re-settlement—Non-disclosure of forfeiture clause—Independent advice—Rectification—Delay—Acquiescence.

A condition subsequent in a re-settlement provided that if any person thereby made tenant for life or tenant in tail by purchase should "become a Roman Catholic or profess that he or she is of the Roman Catholic religion" then both such person and his issue should forfeit all interest thereunder. It was contended (i) that the condition was void for uncertainty in that the term "Roman "Catholic" was ambiguous; that it was not possible to ascertain with certainty how or at what time a person "became" a Roman Catholic; and that it was not certain what acts or conduct would amount to "profess," or whether "religion" meant religious organisation or a system of belief; (ii) that the condition was void as contrary to public policy as tending to fetter the parents of any infant entitled under the settlement in discharging their parental duty with regard to the religious instruction of such child.

Held, (1) that the term "Roman Catholic" was unambiguous and meant a member of any church which acknowledged the supremacy of the Pope, and who accepted the authority of the Roman Catholic church in religious matters; that the question whether a person professed that he or she was of the Roman Catholic religion was whether such person had accepted the authority of the Roman Catholic church in religious matters, and that this was a question of fact which was capable of being precisely ascertained; that all persons who have become Roman Catholics must have made such an acceptance as aforesaid; and that accordingly the condition was not void for uncertainty.

(2) that where the choice of religion may involve a forfeiture the court will not hold an infant to a binding choice until he is old enough to choose his religion for himself and can be regarded as released from his father's right to determine in what religion he should be brought up, and accordingly the condition did not interfere with the father's right and was not void as contrary to public policy.

In re Borwick [1933] Ch. 657 distinguished.

A father and son who were entitled under two settlements as tenant for life in possession and tenant in tail in remainder respect-

(1) In the Chancery Division before Black J.

ively concurred in a re-settlement on the coming of age of the son, the father bringing into the re-settlement certain lands of which he was seised in fee simple. By the re-settlement the properties comprised therein were limited to the father for life, then to the son for life, with divers remainders over including remainders to the son's children in tail.

At the instance of the father a forfeiture clause was inserted in the re-settlement by which if any person entitled under the re-settlement as tenant for life or tenant in tail by purchase should become a Roman Catholic or profess that he or she was of the Roman Catholic religion the property should pass under the settlement as if such person were dead without issue. The son was not consulted about this clause and did not know of its insertion, and he executed the re-settlement in ignorance that the clause was contained therein and without professional advice.

Held, that the forfeiture clause was such an unusual provision in a re-settlement that it should have been brought to the attention of the son and he should have been given professional advice as to its nature and effect, and as this had not been done the son acquired a right to have the re-settlement rectified by the deletion of the clause; but that as after events giving rise to a forfeiture had occurred the son had acted so as to lead the remainderman next entitled in the event of a forfeiture to believe that he had accepted the validity of the clause, he was barred by laches and acquiescence from asserting his right to rectification.

Held, further, that the son's children who claimed under the re-settlement had a similar right to that of the son to have the re-settlement rectified by the deletion of the forfeiture clause, and that such children were not bound by the laches or acquiescence of their father; and that accordingly the right of such children to have the re-settlement rectified was not barred.

ACTION for declarations that a clause of forfeiture in a re-settlement was void or alternatively that the re-settlement should be set aside or rectified.

The plaintiff Connolly Robert McCausland was the son of the late Maurice Marcus McCausland of Drenagh in the County of Londonderry, and attained the age of twenty-one years on the 11th July, 1927. At that date certain freehold lands in the County of Londonderry and capital moneys stood limited by virtue of an indenture of re-settlement dated the 9th August, 1897 (hereinafter referred to as " the re-settlement of 1897 ") to Maurice Marcus McCausland as tenant for life in possession with remainder to Connolly Robert McCausland in tail male; and other freehold lands in the same county and capital moneys stood limited by

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virtue of the will of Connolly Thomas McCausland, father of Maurice Marcus McCausland, to Maurice Marcus McCausland as tenant for life in possession with remainder to Connolly Robert McCausland in tail male.

In the month of June, 1927, Maurice Marcus McCausland instructed the family solicitor, Mr. Ingram of the firm of Martin, King, French and Ingram, to prepare disentailing deeds and a re-settlement to be executed on the coming of age of Connolly Robert McCausland, and conveyancing counsel was instructed to settle the necessary documents. On the suggestion of Maurice Marcus McCausland the case for counsel proposed the insertion in the re-settlement of a clause providing for a forfeiture if any person benefiting under the re-settlement should become a Roman Catholic. Notwithstanding counsel's advice that such a clause was unusual and its insertion unwise Maurice Marcus McCausland insisted on its insertion.

The re-settlement as finally drafted comprised (*a*) freehold lands of which Maurice Marcus McCausland was owner in fee simple subject to certain Land Purchase Annuities ; (*b*) the freehold lands and capital moneys settled by the re-settlement of 1897 ; (*c*) the freehold lands and capital moneys settled by the will of Connolly Thomas McCausland. As a preliminary to this draft re-settlement a draft disentailing deed barred the entails created under the re-settlement of 1897 and the will of Connolly Thomas McCausland. The properties were settled by the terms of the draft re-settlement to such uses as Maurice Marcus McCausland and Connolly Robert McCausland should jointly appoint, and in default and subject to such appointment to the use that during their joint lives Connolly Robert McCausland should receive a yearly rentcharge of £400, and subject thereto to the use of Maurice Marcus McCausland for life and after his death to the use of Connolly Robert McCausland for life with remainder to the use of his first and other sons successively in tail with divers remainders over.

Clause 15 of the draft re-settlement read : " If any " person hereby made tenant for life or tenant in tail

"by purchase of the settled freeholds shall become a "Roman Catholic or profess that he or she is of the "Roman Catholic religion then and so often as the same "shall happen the settled freeholds shall go and remain "to the uses upon the trusts and subject to the powers "and provisions to upon and subject to which the same "would have stood limited and settled by virtue of "these presents if such person were dead without "issue."

Connolly Robert McCausland, who was on service in the army in England at all material times in 1927, was not consulted regarding the insertion of this clause, nor was it submitted to him for consideration or approval.

On the 4th August, 1927, Mr. Ingram wrote to Connolly Robert McCausland stating that the deeds were being sent that day to a firm of solicitors in London and invited him to arrange an appointment to execute the deeds. This letter, though purporting to set out the effect of the draft re-settlement, made no reference to clause 15, but stated that the re-settlement followed the general lines of the re-settlement of 1897, though in fact the re-settlement of 1897 contained no provision similar to clause 15. On the same day the draft deeds were sent to a firm of solicitors in London with a request to have the deeds executed, but no suggestion was made that they should acquaint themselves with their provisions and explain them to Connolly Robert McCausland.

On the 9th August, 1927, Connolly Robert McCausland attended at the office of the firm of solicitors in London. He was offered an opportunity of reading the deeds and did read a few pages, but no explanations were given to him. He thereupon executed the deeds.

On the 6th June, 1932, Connolly Robert McCausland married Margaret Louisa Edgcumbe, and by a marriage settlement of that date provision was made in exercise of the joint power of appointment given to Maurice Marcus McCausland and Connolly Robert McCausland by the re-settlement of 1897 for a jointure rentcharge of £500 per annum to the wife should she survive her

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husband, and for a further rentcharge of £200 per annum to Connolly Robert McCausland during the joint lives of his father and himself. During the course of negotiations for the said marriage settlement Mr. Ingram handed to Connolly Robert McCausland a document entitled "Proposals for Settlement" which contained a short note of the limitations in the re-settlement of 1927 and which stated that all such limitations were subject to certain clauses as to name and arms and change of religion. Connolly Robert McCausland deposed that he did not notice the reference to change of religion at that time, that he did notice it shortly after his marriage, but that he did not appreciate the meaning of the references.

By his marriage Connolly Robert McCausland had issue two boys and two girls, of whom the eldest son, Marcus Edgcumbe McCausland, was born on the 8th September, 1933.

Maurice Marcus McCausland died on the 14th June, 1938.

In November, 1939, Connolly Robert McCausland discussed a possible change of religion with his brother-in-law Lucius Perronet Thompson, husband of Helen Laura the eldest sister of Connolly Robert McCausland, and the said Lucius Perronet Thompson, as the learned judge found, told Connolly Robert McCausland that there was a "religion clause" in the re-settlement of 1927 and advised him to investigate it.

On the 3rd May, 1940, Connolly Robert McCausland was received into the Roman Catholic Church and this fact became known in the month of September, 1940, to the trustees of the re-settlement of 1927 who took the view that a forfeiture under clause 15 had taken effect and that the properties comprised in the re-settlement thereby passed to Helen Laura Thompson as if Connolly Robert McCausland were dead without issue. Connolly Robert McCausland took legal advice both in England and in Northern Ireland, and discussions on a friendly basis took place between the interested parties. After various negotiations referred to in detail in the following judgment Connolly Robert McCausland wrote on the 15th November, 1941, to

Mr. Ingram as solicitor for the trustees of the re-settlement of 1927 a letter in which he said: "I am "writing to tell you that I no longer feel myself in a "position to bring an action in the Courts against the "Re-settlement of 1927. I do wish however to make "it perfectly clear that by 'accepting' the Settlement "I hope to make things easier for you, and the other "trustees, and I do not wish to prejudice any re-"opening of the case by me, or my descendants at "some future, and more favourable time."

Thereupon Helen Laura Thompson as tenant in tail next entitled under the remainders over on the death of Connolly Robert McCausland without issue went into possession, and in compliance with a name and arms clause contained in the re-settlement of 1927 her husband assumed the surname of Thompson-McCausland and the arms of McCausland.

On the 19th June, 1944, the plaintiffs Connolly Robert McCausland, his wife Margaret Louisa McCausland, and his eldest son Marcus Edgcumbe McCausland (an infant suing by the said Connolly Robert McCausland as next friend) instituted the present action against the trustees of the re-settlement of 1927, Helen Laura Thompson-McCausland, and other parties interested under the re-settlement. The plaintiffs by their statement of claim averred:

(1) that clause 15 of the re-settlement of 1927 was void for uncertainty;

(2) that the said clause was void as being contrary to public policy;

(3) that Connolly Robert McCausland was induced to execute the re-settlement of 1927 by misrepresentation;

(4) that Maurice Marcus McCausland and Mr. Ingram failed to disclose to Connolly Robert McCausland that a new and unusual clause had been introduced into the re-settlement;

(5) that Connolly Robert McCausland and Maurice Marcus McCausland executed the re-settlement under the mutual mistake of fact that the contents and effect of the re-settlement had been explained to Connolly Robert McCausland;

(6) that Connolly Robert McCausland executed the re-settlement under the mistaken belief that he had received all necessary explanations and was bound in obedience to his father to execute the same ;

The plaintiffs claimed the following relief :—

(i) a declaration that the forfeiture clause was void ;

(ii) alternatively, that the settlement should be set aside ;

(iii) alternatively, that the re-settlement should be rectified by striking out the forfeiture clause ;

(iv) alternatively, a declaration that the forfeiture clause did not apply to :

(*a*) the capital moneys comprised in the re-settlement ;

(*b*) the rentcharge created by the marriage settlement of 1932 ;

(v) a declaration that Connolly Robert McCausland was tenant for life and Marcus Edgcumbe McCausland tenant in tail male in remainder under the re-settlement.

The defendants by their several defences denied the material averments contained in the statement of claim, and further pleaded that Connolly Robert McCausland had in the year 1941 accepted and confirmed the terms of the settlement and acquiesced in the operation of the forfeiture clause, and in consequence Helen Laura Thompson-McCausland and the trustees of the re-settlement of 1927 had altered their positions, and that the plaintiff Connolly Robert McCausland was estopped from asserting that the forfeiture clause could not and had not operated and that he and the other plaintiffs had acquiesced in the operation of the forfeiture clause and had been guilty of such delay and laches as disentitled them to the relief claimed.

McSparran K.C., Nicholson K.C. and *Grant* for the plaintiffs Connolly Robert McCausland, Margaret Louisa McCausland and Marcus Edgcumbe McCausland (suing by Connolly Robert McCausland his next friend).

McCoy K.C., *Curran K.C.* and *McVeigh* for the trustees of the re-settlement, defendants.

Gibson for Helen Laura Thompson McCausland and Eileen Mary Stronge, defendants.

Lowry A.-G., *Sheil K.C.* and *Topping* for Marcus Perronet McCausland, defendant.

McCall and *Conaghan* appeared for other parties interested under the re-settlement.

Cur. adv. vult.

BLACK J. [after stating the facts continued]:— BLACK J.

The first contention is that clause 15 is void for uncertainty. It is well established by a long series of decisions of the highest authority that conditions such as that contained in clause 15, intended to operate in defeasance of a vested estate or to cause a forfeiture, are viewed most unsympathetically by the courts and will be held to be void for uncertainty unless, as was said by Parker J. in *In re Sandbrook* (1), they are such that from the moment of their creation the court can say with reasonable certainty in what events the forfeiture will occur. The wording in clause 15 which falls to be considered is, "If any "person . . . shall become a Roman Catholic or "profess that he or she is of the Roman Catholic "religion." The plaintiffs contend that this is a composite clause within the meaning of that phrase as used in *Clayton v. Ramsden* (2), and that, therefore, it is sufficient to render the clause void if the court can be satisfied either that the expression "shall "become a Roman Catholic" is void for uncertainty or that the expression "profess that he or she is of "the Roman Catholic religion" is void for uncertainty. They argue, however, that both these expressions are void for uncertainty, that the requirements which must be fulfilled in order that a person can be said to have become a Roman Catholic are such that it may not always be possible in regard to a specified individual

(1) [1912] 2 Ch. 471, 477. (2) [1943] A.C. 320.

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to say with certainty whether or not he has become a Roman Catholic, and also that the expression "profess "that he or she is of the Roman Catholic religion" has not a sufficiently clear or precise meaning to enable one to say with certainty what exactly falls within that phrase.

In my view the words "shall become a Roman "Catholic" as used in clause 15 must be taken as referring to a person who had previously not been a Roman Catholic but had come to embrace that religion. They are words which prima facie denote change or transition and I do not think that in their ordinary and natural meaning they should be taken as referring to a person who had always been a Roman Catholic. "The word 'become' in its usual and proper accepta- "tion imports a change of condition, that is, the "entering into a new state or condition by a change "from some former state or condition" (per Kindersley V.-C., in *Archer v. Kelly* (1), quoted by Eve J. in *In re Williams* (2).) In reading the clause one is tempted to think that the draftsman intended to deal primarily with the case of a non-Roman Catholic tenant for life or tenant in tail changing his religion and becoming a Roman Catholic, and that he added the words "or "profess that he or she is of the Roman Catholic "religion" to cover cases in which it might be doubtful whether the person in question had or had not been formally accepted into the Roman Catholic Church. The latter words, however, have, I think, a wider effect than this. They are wide enough to cover the case of a person who had not effected any change of religion but had always been a Roman Catholic.

With regard to the contention that the words "shall "become a Roman Catholic" are void for uncertainty it is somewhat striking that this contention never appears to have been put forward until quite recently in any reported case, though occasion for such an argument must, I should think, have frequently arisen. In such modern cases as *In re Wright* (3), and *In re Morrison's Will Trusts* (4), it does not appear to have

(1) (1860) 1 Dr. & Sm. 300, 304.
(2) [1911] 1 Ch. 441.
(3) (1937) 54 T.L.R. 153.
(4) [1940] Ch. 102.

been suggested that conditions working a forfeiture in the event of a legatee becoming a Roman Catholic were void. The point was undoubtedly made in *In re Evans* (1). In that case Farwell J. refused to accept the contention that a condition of forfeiture upon a person becoming a convert to the Roman Catholic religion is void for uncertainty. But that decision is criticised in the present case as being founded upon a mistaken view of the learned judge that the fact of becoming a convert to the Roman Catholic religion was always signalized by a formal and definite ceremony of admission into that Church.

The hope of challenging successfully such conditions as that contained in clause 15 has recently derived a stimulus from the opinions expressed by the majority of the House of Lords in *Clayton v. Ramsden* (2) that a condition providing for a forfeiture in the event of a legatee marrying a man "not of the Jewish faith" was void for uncertainty and by the adoption of these opinions as authoritative by Uthwatt J., in *In re Donn* (3). The basis of these opinions was that the question whether a man was of the Jewish faith was a question of degree and that the condition on which the forfeiture was to take place was accordingly too vague to enable it to be said with certainty whether every possible individual who might have to be considered did or did not comply with the requirement. The opinions in *Clayton v. Ramsden* (2) that the words "not of the Jewish faith" were void for uncertainty do not, of course, lead automatically to the conclusion that the words "shall become a Roman Catholic or "profess that he or she is of the Roman Catholic "religion" are necessarily also void for uncertainty. It is necessary in any particular case to consider the precise words used in that case and to endeavour to determine whether or not these words are sufficiently certain within the principle laid down in *Clavering v. Ellison* (4), *In re Sandbrook* (5), and *Clayton v. Ramsden* (2).

(1) [1940] Ch. 629.
(2) [1943] A.C. 320.
(3) [1944] Ch. 8.
(4) (1859) 7 H.L.C. 707.
(5) [1912] 2 Ch. 471.

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As regards the meaning to be given to the expression "shall become a Roman Catholic" the plaintiffs contend that the manner and circumstances in which a person becomes a Roman Catholic are to be ascertained from the law and practice of the Roman Catholic Church. Accordingly they claimed to be entitled to adduce evidence of persons qualified by their knowledge of the law and practice of that Church for the purpose of proving how a person becomes a Roman Catholic and of establishing if possible that the phrase is not one of sufficiently certain meaning. The defendants, on the other hand, contended that such evidence was inadmissible. They argued that the phrase "become "a Roman Catholic" is not to be interpreted as it would be by canonists such as Dr. Conway and Dr. Ryan, the witnesses called by the plaintiffs, but as an ordinary English phrase. They relied upon the consideration that, as Dr. Ryan told us in answer to Mr. Curran, the expression "Roman Catholic" is not an expression used in the canon law of the Church and in fact is not an expression which canonists would ever normally use. Canonists, and I take it Roman Catholics generally, would speak not of Roman Catholics but of Catholics, and not of the Roman Catholic Church but of the Catholic Church. It was accordingly said that Dr. Conway and Dr. Ryan were purporting to expound as canonists a phrase which canonists would never use, and it was urged that for the interpretation of the phrase one should not turn to the canonists who do not use the phrase at all but that the court should interpret the phrase as bearing the meaning attached to it where it is in fact used, namely in ordinary everyday speech. In support of this contention reliance was placed on a sentence used by Neville J., in *In re May* (1). "The view of the Court "is not the view of the priest." I do not, however, find this argument at all convincing. Whether or not the expression "Roman Catholic" would be used by canonists themselves, yet the words as used in the re-settlement of the 4th August, 1927, undoubtedly refer to the religious denomination to which Dr.

(1) [1917] 2 Ch. 126, 130.

Conway and Dr. Ryan belong. No doubt the words Roman Catholic as used in everyday conversation have for the ordinary man a clear enough meaning. And it may well be that the court does not require evidence to establish what is meant by a Roman Catholic. Nevertheless where the question is whether the phrase "shall become a Roman Catholic" constitutes a sufficiently certain condition for the validity of a forfeiture clause under the principle of *Clavering v. Ellison* (1) I think that evidence is admissible to show how a person can *become* a Roman Catholic. On this aspect of the case we had the assistance of two witnesses called by the plaintiff, Dr. Conway and Dr. Ryan, both gentlemen of the highest academic qualifications, occupying distinguished positions in their Church, and entitled to speak with authority on the matters upon which they were called to give evidence. Their exposition of the doctrine and practice of the Roman Catholic Church I, of course, unreservedly accept.

Before proceeding to consider the expression "shall "become a Roman Catholic," I must first mention a criticism suggested by Dr. Conway that there is a certain ambiguity about the term "Roman Catholic" itself. This term may, he suggests, be used in two different senses. It may mean a member of that organization which acknowledges the Pope as its visible head, or it may mean a member of that organization which acknowledges the Pope as its head and belongs to the Latin rite. Thus it is said there might be a doubt in regard to a member of one of the Uniat Oriental Churches which acknowledge the papal supremacy but have married clergy and a liturgy in the vernacular. Personally, however, I feel no difficulty in regard to these communities. In my opinion the term Roman Catholic as used in clause 15 is wide enough to cover any of these communities which acknowledge the supremacy of the Pope and accept the authority of the Church in religious matters. It is, I think, significant that in the long history of these provisions designed to fetter or penalise changes

(1) (1859) 7 H.L.C. 707.

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of religion it never appears to have been suggested until quite recently that the term "Roman Catholic" is itself a term of such ambiguity as to render a forfeiture clause void for uncertainty. In the Irish case of *Re Burchill's Contract* (1), the question arose as to the validity of a condition subsequent in a will providing that lands were to go over to another person should the devisee marry a Roman Catholic, and it was held that the condition was valid and effective. And in the recent case of *In re McKenna* (2), the President of the High Court in Eire rejected the contention that a condition was void for uncertainty which imposed a forfeiture in the event of a legatee marrying a Roman Catholic. The learned President says: "I am confronted by a familiar expression, used "by a Protestant farmer in his will; I know what he "meant and practically every citizen in every walk "of life, be he Catholic or Protestant, knows the "meaning conveyed by the words 'marry a Roman "'Catholic.' I wish to state emphatically that I do "not concern myself with any theological definition "of membership of the Church; I have only to construe "the plain words used by a plain man in a sense plain "to all of us; and I shall not make the law justly "ridiculous in the eyes of persons of common sense by "declaring a current expression, which the People "knows and understands, to be unintelligible in the "High Court of Justice of Ireland. I think it would "be hard to find an expression that conveys more "clearly exactly what it means throughout this "country. We say that a man is a Catholic or that "he is not; if he is, then in ordinary parlance whether "he be a good Catholic or a bad Catholic or an in-"different one, a Catholic he remains. On the other "hand, if a litigant undertakes to prove that a man "who was a Catholic has actually given up the faith, "so that he is no longer in ordinary parlance a Catholic, "he may or may not succeed in Court, because his "proofs of the fact that he set out to establish may "or may not be adequate, but his success or failure "will not be due to any doubt about the accepted "meaning of the expression 'Roman Catholic.'"

(1) (1912) 46 I.L.T.R. 35. (2) [1947] I.R. 277, 285.

Coming now to the expression "shall become a Roman "Catholic" Dr. Conway and Dr. Ryan, speaking as canonists, tell us that there is no cut and dried formula which would enable one to say with absolute certainty whether or not a particular individual has become a Roman Catholic or to say at what precise time he became a Roman Catholic. Though in regard to the majority of converts there is a formal ceremony of reception, yet it is quite possible according to the law of the Church that a person may become a member of it without undergoing any such ceremony, and a great number of those who undergo the ceremony have in the eyes of the Church probably become members some time before the actual ceremony. In order for a convert to become a member of the Church three things are necessary:

1. He must have been validly baptized.
2. He must not have been subject to ex-communication by reason of having been gravely culpable in going against the dictates of his conscience in rejecting the authority of the Church in religious matters.
3. His acceptance of the authority of the Church in religious matters must either be formally expressed to a Roman Catholic priest or must be publicly known.

With regard to the first of these requirements it is not necessary, according to the doctrine of the Roman Catholic Church, that baptism in order to be valid must be administered by a priest. It may be validly administered by a layman and even by a person who does not believe in its efficacy, provided that he has the intention of administering Christian baptism "*faciendi quod facit ecclesia.*" In the case of a convert from the Church of England or the Church of Ireland, the great probability will be that he will already have been validly baptized; and if so, no re-baptism will be necessary upon his becoming a Roman Catholic. But it may not be possible to say with certainty that such a person has already been validly baptized. This may be for either of two reasons. It may, on the one hand, not be possible to say definitely whether his

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baptism was such as the Church would recognize as valid; the person purporting to perform the rite may, for example, have used a formula not recognized as sufficient by the Church. And on the other hand the Church itself recognizes that the essential elements of the rite have not been defined with absolute precision; there are certain slight departures from the usual form of the ceremony which may or may not render it invalid; the Church is not able to pronounce definitely as to these; in regard to them there is a certain area of uncertainty. It is by reason of this difficulty of saying with certainty that the previous baptism of a convert was valid in accordance with the doctrine of the Church that it is usual to administer conditional baptism to converts. But conditional baptism would not be administered if the ecclesiastical authorities were clearly satisfied that the convert's original baptism was valid. Dr. Ryan in his evidence mentioned one distinguished convert from Anglicanism who did not receive conditional baptism upon his admission to the Roman Catholic Church.

The plaintiffs say that on account of these considerations the question whether a person has become a Roman Catholic is a question which cannot always be determined with certainty. A convert who has not received conditional baptism or before he has received conditional baptism may or may not have become a Roman Catholic according to the doctrine of the Church. The question may turn on whether his original baptism was valid. And this may depend not on any difficulty as to evidence, but upon the impossibility which the Church finds in pronouncing whether some particular departure in the ceremony from the orthodox form used by the Church had or had not the effect of rendering the baptism invalid.

So too in regard to the second requirement, there is not only the difficulty of evidence as to whether or not the convert has been guilty of *gravis culpa*, but just as in regard to baptism, there is the further difficulty that even if there were no difficulty as to evidence and if all the facts were known the Church might still not be able to pronounce with certainty in a particular

case whether or not the convert's guilt was sufficiently gross as to have involved him in the penalty of excommunication. Accordingly, it is usual for a convert to receive conditional absolution as well as conditional baptism. But if a convert does not receive conditional absolution his membership of the Roman Catholic Church may depend on whether or not he had been guilty of *gravis culpa* in rejecting the Church's authority against the dictates of his conscience. And this may be a matter which is impossible of certain determination, not merely by reason of the difficulty of ascertaining all the facts but by reason of the Church finding it impossible to pronounce with certainty whether certain facts constituted *gravis culpa* or not.

In regard to the third requirement there is a similar difficulty. The convert's acceptance of the authority of the Roman Catholic Church in religious matters must have either been formally expressed by him to a Roman Catholic priest or he must have allowed it to become publicly known. Where there has been no formal expression before a priest the question whether the acceptance of the Church's authority has become publicly known is a matter on which, according to canonists, there may be uncertainty because the Church has not been able to define with precision at what point knowledge which is being diffused becomes public knowledge. As Dr. Conway said, if only one or two persons had been told in the strictest confidence of the convert's acceptance of the Church's authority it could be said with certainty not to be publicly known; if at the other extreme the majority of the persons in his parish knew of his acceptance it could be definitely said to be publicly known. But in between these two extremes there is an area of uncertainty in which there are events or circumstances in which no canonist could say even with the fullest possible knowledge of the facts whether the acceptance was publicly known or not.

Dr. Conway's attention was called to the passage in the judgment in *In re Evans* (1), where Farwell J. is reported as saying: "A person becoming a convert to

(1) [1940] Ch. 629, 634.

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"the Roman Catholic faith must do definite acts and "must be admitted into the Roman Catholic Church. "Before being admitted into the Roman Catholic "Church, such a person must renounce the religion "which he or she had before, and, before becoming a "convert, is baptized, perhaps conditionally, into the "Roman Catholic Church and is given a name on that "baptism." Dr. Conway is unable to accept this as an accurate statement of the practice of his Church. He tells us that a renunciation by a convert of his previous religion is only necessary where he had incurred the censure of ex-communication. And a convert is baptized only if his earlier baptism is invalid or doubtfully valid; if his earlier baptism is clearly valid it is actually forbidden to give him conditional baptism. If he is given conditional baptism he is given a name; the practice is to give him the same name as he had before. It is not correct to say that a person becoming a convert to the Roman Catholic faith must necessarily do definite acts in this sense that it is not essential in every case that there should be anything in the nature of a reception ceremony or any clear cut ceremony at all.

I think it may be convenient to defer further consideration of these criticisms of the expression "shall "become a Roman Catholic" until we have considered the criticisms offered in regard to the following phrase in clause 15 of the re-settlement "or shall profess that "he or she is of the Roman Catholic religion." This latter phrase is criticised as being uncertain on several grounds. It is said that the word religion as used in the phrase is ambiguous, that it may mean either a certain religious organisation or a system of religious belief. The word profess is criticised as being uncertain on the ground that it is impossible to specify with precision what acts and what conduct would clearly amount to a profession. And questions are raised as to whether such bodies as the Old Catholics or the Modernists or persons holding the Branch theory of the Christian Church could or could not be said to profess that they are of the Roman Catholic religion within the meaning of that phrase in clause 15. I

confess that I am not greatly impressed by these criticisms. As Dr. Conway and Dr. Ryan have told us, the essential profession which a man must make in order to become a member of the Roman Catholic Church is a profession of his acceptance of the authority of that Church in religious matters. Accordingly I think one may legitimately regard the phrase " profess " that he is of the Roman Catholic religion " as meaning " profess that he is of the religion one of whose essential " tenets is the acceptance of the authority of the " Roman Catholic Church in religious matters." In regard to the Roman Catholic Church the phrase has clearly a much more definite and certain meaning than it might have in regard to other Churches. A man might profess to be an Anglican without committing himself to accept as authoritative every proposition contained in the Thirty-nine Articles. A man might profess to be a Presbyterian without committing himself to accept as authoritative every proposition contained in the Westminster Confession of Faith. In these cases there may perhaps be a question of degree. But the profession which a person makes in professing that he is of the Roman Catholic religion is a profession that he accepts the authority of that Church in religious matters. In this case the matter is not a question of degree. It is a definite clear cut question of acceptance or non-acceptance. To adopt a phrase used frequently in the evidence there is no area of uncertainty. No doubt, difficulties may sometimes arise as to whether certain statements or certain conduct should be held to amount to a profession by a person that he accepts the authority of the Roman Catholic Church. But this is merely a difficulty in regard to whether or not the evidence establishes that the condition has been fulfilled. It does not constitute any uncertainty as to the meaning of the condition itself. In regard to any condition whatever, however clear and unambiguous it may be, difficulties may arise as to whether in a particular case the evidence establishes sufficiently clearly that the condition has been complied with. But this difficulty does not make the condition itself uncertain. The word " profess " is an ordinary English

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word and must be construed as such. To my mind the question whether a man has professed that he is of the Roman Catholic religion or that he accepts the authority of the Roman Catholic Church in religious matters is a simple question of fact to be decided as best one can upon the evidence available. There is no uncertainty, however, as to the matter which is to be decided. In my opinion it is equally a pure question of fact and of evidence, no matter in regard to what individual the question arises, whether he be an orthodox Roman Catholic or an Old Catholic or a Modernist or one who holds the Branch theory.

The phrase "profess the Roman Catholic religion" is a phrase well known in English law. It runs through the Roman Catholic Relief Acts. And some of the sections of those Acts (e.g., s. 14 of the Act of 1791 and ss. 12, 15 and 18 of the Act of 1829) impose or affirm disabilities on persons "professing the Roman "Catholic religion." Again, by the joint effect of the Act of Settlement and the Bill of Rights every person "who shall profess the Popish religion" is excluded from the succession to the Crown. I appreciate of course that an expression in an Act of Parliament, even though it occurs in a penal section, may have to be given a meaning and an effect although the same expression, if used in a will or a settlement, might conceivably under the rule in *Clavering v. Ellison* (1) be regarded as too uncertain to effect a defeasance of a vested estate. Nevertheless, I think that the use of the phrase in these great constitutional documents of English law lends weight to the contention that it is a phrase having a definite meaning. The Legislature when concerned to deal with matters of the most vital constitutional importance obviously considered that there was a definite and ascertainable class of persons who could be sufficiently defined by the words "who "profess the Roman Catholic religion." Moreover the phrase is to be found recurring in later statutes, e.g., The Places of Worship Registration Act, 1855, s. 2; the Roman Catholic Charities Act, 1860, s. 1; the Test Abolition Act, 1867, s. 2. One concludes

(1) (1859) 7 H.L.C. 707.

that Parliament has over a long period of years considered it the appropriate and fitting expression to use when seeking to describe a certain class of His Majesty's subjects. The phrase must also, I should think, have been frequently used by settlors and testators in framing conditions such as the one under consideration in the present case, and I am not aware of it ever having been suggested in any reported case that it was void for uncertainty. No such suggestion for example appears to have been made in *Duggan v. Kelly* (1) either before the Master of the Rolls or on appeal. Accordingly, notwithstanding the criticisms to which the phrase has been subjected in the present proceedings, I am unable to hold that a condition of forfeiture in the event of a person professing the Roman Catholic religion is void for uncertainty under the principle of *Clavering v. Ellison* (2).

I now come back to the expression "shall become a "Roman Catholic." Here again, whatever may be the necessary conditions to be fulfilled before a person becomes a Roman Catholic, I do not think that the expression becomes uncertain merely because there may be difficulties in evidence as to whether those conditions have been fulfilled. The uncertainties, if any, must reside in the conditions themselves. These uncertainties according to Dr. Conway and Dr. Ryan are threefold: (*a*) If a convert has been previously baptized and is not re-baptized it may be that there was in his baptism some deviation from the practice of the Church in regard to the baptismal ceremony of such a nature that the Church could not definitely say whether his baptism was valid or not. (*b*) The convert may have incurred the penalty of excommunication by going against his conscience in rejecting the Church's teaching. Even if all the facts were fully known it might conceivably be impossible for the Church to pronounce definitely whether his conduct was so gravely culpable as to involve excommunication. (*c*) The Church cannot define with precision the extent of publicity requisite in order that the convert's

(1) (1847) 10 Ir.Eq.Rep. 295, 473.
(2) (1859) 7 H.L.C. 707.

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acceptance of the Church's authority may be publicly known. In this case also, even with all the facts fully ascertained, the Church might in some individual instances find it impossible to pronounce definitely whether the acceptance of her authority had or had not become publicly known.

While I appreciate that these uncertainties present themselves to the canonist as possibilities I imagine that it will be extremely rarely that any of them will be encountered in practice in regard to a convert to the Church. Thus Dr. Ryan told us that he had never personally known an actual case where a convert was prevented from becoming a member of the Church by reason of having incurred excommunication. When a person belonging to another Church decides to become a Roman Catholic and allows his acceptance of the authority of the Church to become known, but there is any doubt as to the validity of his baptism, the ecclesiastical authorities will arrange that he be given conditional baptism. Similarly, if there is any doubt whether he may have incurred excommunication he will be given absolution. One might, I should imagine, have to search for a very long time before discovering a single individual whose membership of the Roman Catholic Church was doubtful upon either of these grounds. It seems to me that it would be stretching the principle of *Clavering v. Ellison* (1) to its farthest possible limits and perhaps beyond them to hold that on either of these grounds the phrase "shall become a "Roman Catholic" is void for uncertainty. But however this may be Dr. Conway and Dr. Ryan have told us that one of the essentials of a person becoming a Roman Catholic is that his acceptance of the authority of the Church in religious matters must either be formally expressed to a Roman Catholic priest or must be publicly known. It is obvious that a convert's acceptance of the Church's authority can only be publicly known if there has been some profession by him of that acceptance either by words or conduct. As I have already suggested one can hardly give a better definition or paraphrase of the expression

(1) (1859) 7 H.L.C. 707.

"profess the Roman Catholic religion" than by substituting the phrase "profess that religion one of "whose essential tenets is the acceptance of the "authority of the Roman Catholic Church in religious "matters." It therefore appears that every person who may have become a Roman Catholic within the meaning of that expression as used in clause 15 of the re-settlement of the 4th August, 1927, must also of necessity have professed the Roman Catholic religion within the meaning of the later expression used in that clause. The later expression "shall profess the Roman "Catholic religion" includes of course not only converts but persons who have professed that religion all their lives. But even in regard to converts it is a wider expression than the earlier one "shall become a "Roman Catholic." It will include converts who have made any profession whatever of the Roman Catholic religion even though there may be a doubt whether their acceptance of the Church's authority has become sufficiently publicly known to justify their being regarded by the Church as members. There may, of course, be difficulties in particular cases as to whether the evidence is sufficient to satisfy the court that the individual has in fact professed the Roman Catholic religion. But as I have said before, such difficulties are merely difficulties as to evidence and do not render the condition itself uncertain. So too the expression "shall profess the Roman Catholic religion" will also include converts whose membership of the Church may according to the canonists be doubtful because their baptism may not have been sufficiently in accord with the Church's practice or because they may conceivably have incurred excommunication, assuming of course that such converts have made a profession of their acceptance of the authority of the Church. It results, therefore, in my opinion that whether or not the expression "shall become a Roman "Catholic" be sufficiently certain to satisfy the stringent requirements of the principle of *Clavering v. Ellison* (1), yet every person by any possibility covered by that expression will be included in the larger class

(1) (1859) 7 H.L.C. 707.

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covered by the later expression "shall profess the "Roman Catholic religion." In other words persons who have become Roman Catholics merely constitute one special class of persons who have professed the Roman Catholic religion. Accordingly, in order to decide whether a person is affected by clause 15 or not it is sufficient to consider whether he has professed the Roman Catholic religion and it is not necessary to determine whether or not he has actually become a Roman Catholic. As I have already said, I have come to the clear conclusion that the condition expressed by the words "shall profess the Roman Catholic "religion" cannot be held to be void for uncertainty. That being so, it appears to me immaterial whether the expression "shall become a Roman Catholic" which merely describes one particular class of the persons covered by the phrase "shall profess the "Roman Catholic religion" is or is not open to objection on the grounds of uncertainty. I therefore hold against the plaintiff's first contention that the condition providing for forfeiture contained in clause 15 of the re-settlement of the 4th August, 1927, is void for uncertainty.

The plaintiffs' second contention is that the condition providing for forfeiture contained in clause 15 is void as being contrary to public policy. It is said that the clause may apply to an infant beneficiary under the re-settlement and that it is accordingly void as tending to fetter the infant's parents in discharging their parental duty in regard to the religious instruction of their children. Thus if a female tenant for life under the re-settlement married a Roman Catholic it is contended that the clause would tend to deter her husband from bringing up the children of the marriage in his own religion and that if the children chanced to become wards of court it would hamper the court in exercising its discretion in regard to their religious upbringing inasmuch as if the court directed the children to be instructed in their father's faith the result might be to cause them to forfeit their interests under the re-settlement. In support of this contention that clause 15 is void as being contrary to public

policy the plaintiffs rely upon such cases as *In re Borwick* (1) and *In re Tegg* (2). In *In re Borwick* (1) a condition subsequent contained in a settlement provided that an interest which would otherwise have become vested in a grandchild of the settlor on attaining 21 should be forfeited if the grandchild should at any time before attaining a vested interest under the trusts of the settlement be or become a Roman Catholic or not be openly or avowedly Protestant. Bennett J. held this condition to be void on the ground that it operated to interfere with a parent in the exercise of his duty as regards the religious instruction of his children. In *In re Tegg* (2) a condition in a will providing for the forfeiture of an interest given to the testator's daughter if any child of hers was sent to a Roman Catholic school for education was held void by Farwell J. as being a fetter upon the daughter to do what she might think best for the welfare and education of her children. In my opinion, however, the present case differs essentially from *In re Borwick* (1) and *In re Tegg* (2). In *In re Borwick* (1) the condition was clearly to operate during the infancy of the settlor's grandchildren as was pointed out by Bennett J. The grandchildren's interests were to vest at 21 and the forfeiture clause was to operate if a grandchild should at any time before attaining a vested interest be or become a Roman Catholic or not be openly or avowedly Protestant. So too in *In re Tegg* (2) the condition was to operate during the infancy of the testator's daughter's children. In the present case, however, according to the wording of the re-settlement the condition is only to operate if the individual does a certain positive act, i.e., if he becomes a Roman Catholic or professes the Roman Catholic religion. The authorities go to show that under a clause of this nature, providing for a forfeiture by a beneficiary of his interest under a settlement as a result of the doing by him of a certain specified act, the court will not, unless compelled by the express terms of the clause, hold the doing of the act by the beneficiary to work a forfeiture until he has reached an age when he can

(1) [1933] Ch. 657. (2) [1936] 2 All. E. R. 878.

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exercise a real choice of his own in the matter : *In re May* (1), *Patton v. Toronto General Trusts Corporation* (2), *In re May* (3). When the clause in effect gives the beneficiary the option on the one hand of doing the act upon which the forfeiture is to depend and of thereby suffering a forfeiture or on the other hand of avoiding the commission of the act mentioned in the clause and of thereby retaining his interest under the settlement the law will not hold him to a binding choice until he has reached years of discretion and is in the eyes of the law competent to decide for himself which course to take. As Lord Hanworth M.R. puts it in *In re May* (3) : " the Court will safeguard " the interests of the infant until such time as he has " reached an age when upon him must rest the responsi- " bility of choice and definite adherence one way or " the other." Accordingly such a forfeiture clause will not operate in the case of an infant until (according to what appears to be the better opinion) he has attained his majority, (*In re May* (1), *Patton v. Toronto General Trusts Corporation* (2),) or at any rate until a time when the court holds him capable of choosing his religion for himself and treats him as released from his father's right to determine in what religion he should be brought up. I therefore come to the conclusion that clause 15 cannot be held void as against public policy on the basis of the principle followed in *In re Borwick* (4) and *In re Tegg* (5). A forfeiture under the clause depends upon the doing of a deliberate act by the beneficiary concerned at a time when the court will regard him as competent to decide for himself whether to do that act or not. The choice of doing the act or not is his own responsibility. The clause does not in any way interfere with a parent's duties or rights in regard to the upbringing of his children. As is illustrated by *Patton v. Toronto General Trusts Corporation* (2), a beneficiary may be brought up by his parents in one religion but when he comes to the age when he has to make a choice

(1 [1917] 2 Ch. 126.
(2) [1930] A.C. 629, 636.
(3) [1932] 1 Ch. 99, 112.
(4) [1933] Ch. 657.
(5) [1936] 2 All. E. R. 878.

whether to qualify himself to take a benefit under a settlement he may well adopt a different religion. Indeed, as was pointed out during the argument of the present case, if the plaintiff's contention that clause 15 is void on the principle of *In re Borwick* (1) is sound, it would mean that a vast number of forfeiture clauses on change of religion which have found their way into settlements and have hitherto been regarded as valid ought to have been treated as unenforceable and void. As showing that the principle upon which *In re Borwick* (1) was decided does not extend so as to invalidate a provision in the terms of clause 15 *In re Morrison* (2) appears to me to be a significant case, especially as it was decided by Bennett J. the judge who had decided *In re Borwick* (1). In *In re Morrison* (2) a testator gave to a great-niece the income of a legacy of £5,000 for life with remainder to the great-niece's children. The will contained a clause, not very dissimilar to clause 15 in the re-settlement of the 4th August, 1927, providing that if any legatee should be or become a Roman Catholic or should marry a Roman Catholic or should give any promise or come under any obligation to bring up any child of such legatee as a Roman Catholic then the legatee should forfeit all benefits given to him or her by the will. It was assumed in the judgment that the great-niece's children were legatees within the meaning of this clause. The dates of the birth of these children are not given in the report, but inasmuch as the great niece was described in the will by her maiden name and as the will was made less than six years before the death of the testatrix, we may, I think, legitimately infer that the forfeiture clause was in operation while the great-niece's children were infants. If the plaintiffs' argument in the present case based on *In re Borwick* (1) is sound the forfeiture clause in *In re Morrison* (2) ought to have been held void. But although his own decision in *In re Borwick* (1) was referred to in the argument Bennett J. held the clause valid. Several of the parties appearing were concerned to contend that the provision for forfeiture was void and ineffective.

(1) [1933] Ch. 657. (2) [1940] Ch. 102.

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Their principal ground of attack against the clause was that it was alleged to infringe the rule against perpetuities. But no one, either judge or counsel, appears to have considered that it could be impeached as being contrary to public policy.

As regards then the second contention put forward by the plaintiffs, I cannot hold that the provision for forfeiture in clause 15 of the re-settlement is void as being contrary to public policy.

I come now to the plaintiff's third contention, namely that clause 15 was inserted in the re-settlement of the 4th August, 1927, without the knowledge or approval of the plaintiff Connolly Robert McCausland and without his being properly advised as regards its effect, and that the re-settlement containing the clause was executed by him under mistake or misrepresentation.

[His Lordship then examined the evidence relating to the circumstances in which the re-settlement of 1927 was executed, and continued] :—

I need not discuss at length the authorities in regard to cases of this type. The general principles upon which the courts proceed are familiar to all practitioners. They will be found expounded and illustrated in the judgments in the well known cases of *Hoghton v. Hoghton* (1) and *Hoblyn v. Hoblyn* (2). Ordinarily the court will scrutinize with a jealous eye any arrangement made between a father and a son immediately after the son has come of age. It takes a different view, however, of transactions in the nature of family arrangements such as the ordinary re-settlement by a tenant in tail on attaining the age of 21 for the purpose of continuing the usual succession to the family estates and of making provision for those members of the family who are not intended to succeed to the property. Such transactions will be supported by the court if they appear to be reasonable and for the benefit of the family, provided of course that they are not obtained through misrepresentation or suppression of facts and that the son is really aware of the nature and effect of the transaction. It is not essential to

(1) (1852) 15 Beav. 278. (2) (1889) 41 Ch. D. 200.

the validity of such a transaction that the son should be separately advised. If there is anything unusual in the transaction it is highly advisable that the son should have separate advice ; as has been said, to omit this precaution is to incur risk. In the ordinary case, however, the son may be properly advised by the family solicitor. But I think that a young man who has just come of age and is asked to enter into a transaction which will have the result of irrevocably curtailing his interest in valuable properties ought to have professional advice as to the nature and effect of the transaction which he is entering into, whether that advice is given by the family solicitor or by an independent legal adviser. Any unusual clause in the re-settlement—at any rate if it is a vital or important one—should be brought to his attention and its purport explained to him. And I think the authorities clearly show that it will not be sufficient that he be given an opportunity of reading the deeds himself or that they should be merely read over to him. Their nature and effect should be clearly explained by someone competent to undertake this task and any important or unusual feature should be fully dealt with.

The provisions contained in clause 15—the forfeiture clause—of the re-settlement of the 4th August, 1927, are undoubtedly unusual provisions. Provisions of this type, although they may be legal and enforceable, have at any rate in modern times been apt to attract unsympathetic criticism from judges who have been called upon to deal with them. I might refer to the observations of Lord Romer in *Clayton v. Ramsden* (1). The court would not sanction the insertion of such a clause in a settlement under the Infants Settlement Act, 1855, *Re Williams* (2). Nor is clause 15 one of minor moment such as a clause merely dealing with management powers over the settled properties or even as a clause dealing with the more remote limitations of the settled estate. It is a clause which might turn out—as it has turned out—to be of vital importance and enormous consequences. Prior to the execution of the re-settlement of the 4th August, 1927, Mr.

(1) [1943] A.C. 320, 332. (2) (1860) 3 L.T. 76.

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Connolly Robert McCausland was tenant in tail of the lands and capital moneys described in Schedules II and III of that deed subject of course to his father's life interest. The balance of probability in the ordinary course of nature was that he would outlive his father. If no resettlement were executed then on his father's death he would have been able, without asking for anyone's concurrence, to put himself in the position of being absolute owner in fee simple of the properties described in those two Schedules. Notwithstanding the undoubtedly favourable disposition of the courts towards family arrangements, I am quite satisfied that the courts would not uphold the insertion in a re-settlement by a tenant in tail who had just come of age of so unusual and so drastic a forfeiture clause which might some day have the effect of automatically sweeping away at one blow his entire interest in all those valuable properties unless there had been carefully explained to him by a competent adviser not only the precise meaning and possible effect of the clause but also his own position and rights as tenant in tail of the settled estates and capital moneys. And as I have already pointed out, so drastic and stringent is the clause that not only would it hit beneficiaries who themselves embraced the Roman Catholic faith, but it might in certain circumstances have the effect of precluding some unfortunate man from succeeding to the family estates who himself had never the slightest notion of becoming a Roman Catholic or of professing the Roman Catholic religion.

What then was in fact done towards bringing the clause to Mr. Connolly Robert McCausland's notice or advising him as to its nature and effect ?

At all material times when the transaction was being carried through Mr. Connolly McCausland was in England and the only solicitors who were advising him were his father's solicitors in Limavady. It is conceded that they had no personal interviews with him in regard to the matter. Their only channels of communication with him were through his father or through the post. It is clear that they kept their diaries and their correspondence methodically and

with care. But nowhere does it appear in their diaries or in their correspondence that they ever called Mr. Connolly Robert McCausland's attention to the clause. Much less did they explain it to him. They only received the draft of the clause from Mr. Longfield on the 27th July. So far as appears from their correspondence they did not send a copy of the draft to Mr. Connolly Robert McCausland. They did not write to him explaining it or advising him as to its possible effects. Nor did they communicate to him the view which Mr. Longfield had expressed that such provisions were unusual and that he was rather against their insertion as they often led to costly litigation. I think this view of counsel who had been instructed to settle the documents on Mr. Connolly Robert McCausland's behalf as well as on his father's was a material consideration which ought certainly to have been brought to his notice and was one of the matters which he should have had an opportunity of considering. The engrossments of the deeds were sent to London on the 4th August and on the same day Mr. Ingram wrote the letter to Mr. Connolly Robert McCausland to which I have already referred. It is tolerably clear that this letter was the only communication or advice which Mr. Connolly Robert McCausland received from his solicitors in regard to the transaction and as I have mentioned it contained no reference whatever to the forfeiture clause. It can scarcely be disputed that the first opportunity which Mr. Connolly Robert McCausland had of seeing anything in writing in regard to the forfeiture clause was when the deeds were produced to him on the day on which he signed them in the London solicitors' office. No doubt he had an opportunity of reading the documents before signing them. He says that he started to read them but could not make much of them and desisted after the first few pages and did not notice clause 15. Whether this be so or not I am satisfied that such an opportunity to read an elaborate deed just before signing it would not be sufficient to bind a young man just come of age with so unusual and stringent a provision in a re-settlement unless the provision was

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explained to him by someone competent to do so. In this connection some observations of Romilly M.R. in *Hoghton v. Hoghton* (1) appear to me to be very much in point. In that case it was alleged that the deeds had been read over to the plaintiff. Romilly M.R. says : " The mere reading over of a deed would " not be sufficient to satisfy me that the person hearing " it read understood it. To an unprofessional person, " however intelligent, and exerting the closest atten- " tion, the long and involved sentences and technical " language of a deed render it frequently unintelligible. " In my opinion, unless it is accompanied with an " explanation of the contents of a deed, the reading " over to an unprofessional person is more likely to " confuse than to enlighten him." I think the same observations could justly be made in a case where it is relied upon that a young man had an opportunity of reading for himself a lengthy and elaborate deed containing all the difficult and forbidding technical provisions of a resettlement. I feel that I could scarcely express my own conclusion upon this part of the case better than by quoting and adopting as applicable to the facts of this present case a sentence from a later portion of Romilly M.R.'s judgment in *Hoghton v. Hoghton* (1). He says : " It is, in my opinion, " proved that the contents of [the deed] were not " properly made known to the son, and that he was left " without the assistance and information which are " indispensable to enable this Court to sustain such a " transaction." Indeed the facts in *Hoghton v. Hoghton* (1) have a considerable similarity to the facts of the present case. In *Hoghton v. Hoghton* (1) the plaintiff had no professional advice or assistance, the draft when settled was not shown to him, the first time that he saw anything in writing relative to the resettlement was on the day and at the time of the execution of the document itself, the evidence raised grave doubts whether the objectionable parts of the settlement were ever brought to the attention of the plaintiff, and Romilly M.R. placed reliance on the circumstance that the settlement was not such a one

(1) (1852) 15 Beav. 278.

as the court would approve of (1). I think that the circumstances in the present case are quite as strong as those in *Hoghton v. Hoghton* (2) and very much stronger than the circumstances in *Hoblyn v. Hoblyn* (3) which Kekewich J. described as a case of extreme difficulty and lying on the border line which divides settlements supportable notwithstanding the exercise of parental influence and those which the court sets aside because the son has not been sufficiently protected. In my view, therefore, on what must be practically the admitted facts of the present case the court would not have held Mr. Connolly Robert McCausland bound by the provisions of clause 15 of the re-settlement if, as soon as he had become aware of the clause, he had instituted proceedings to have the settlement rectified by its deletion.

In coming to this conclusion I have not left out of sight the fact that Colonel McCausland (as he now is) is alive and was able to give evidence at the hearing in support of his account of the matter, whereas both Mr. Maurice Marcus McCausland and Mr. Ingram, who are the persons who might have been able to give evidence on behalf of the defendants to the action in regard to this aspect of the case, are now dead. I have not, however, come to my decision on any ground upon which there could be a real conflict of evidence. The relevant facts are simple and are practically admitted. At all material times Mr. Connolly Robert McCausland was in England and his solicitors were in Limavady. At no time when the settlement was under preparation did they come into personal contact with him. They kept their records and their correspondence with care. They never wrote him in regard to the forfeiture clause, they never sent him a draft of it, they never explained it to him. When writing to him on the 4th August, 1927, they did not mention or explain the clause or advise him as to its desirability or effect. This is the only document produced containing any information or legal advice to Mr. Connolly Robert McCausland from his solicitors

(1) *ibid* 308.
(2) (1852) 15 Beav. 278.
(3) (1889) 41 Ch. D. 200, 213.

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in connection with the matter and it contains internal evidence showing that it was in fact the only document sent to him by them containing such information or advice. In the circumstances, I am satisfied that I am justified in coming to the conclusion which I have arrived at on this part of the case notwithstanding that Mr. Maurice Marcus McCausland and Mr. Ingram were not alive and available to give evidence at the hearing.

The next we hear of the matter is in 1932 shortly before Colonel McCausland's marriage which took place on the 6th June, 1932. During the preceding months there had been discussions and negotiations in regard to the settlements which were to be made on the marriage and at a meeting held in Mr. Ingram's office in March, 1932, Colonel McCausland was handed a document entitled " Proposals for Settlement." The first paragraph of these Proposals contained a short note of the limitations of the re-settlement of the 4th August, 1927, and stated that all such limitations were subject to certain clauses as to name and arms and change of religion which were contained in the deed. Colonel McCausland says that he did not notice this phrase at the time of the discussion in Mr. Ingram's office and that he first noticed it shortly after his marriage. His evidence is that he did not really take a great deal out of the phrase. He appears to have been under no doubt that the religion aimed at was Roman Catholic, but he says that he did not appreciate the meaning of the reference. He tells us that he thought it had something to do with his marriage settlement and that he felt that its effect was that if he changed his religion while his father was alive that his father could cut him off. He further says that he did not think it had anything to do with his wife or children and that it did not occur to him that he had any right to question it. However this may be, Colonel McCausland took no steps at the time in regard to the clause and there is no evidence that the terms of the clause were at this time brought to his notice or explained to him.

The next incident is the interview to which I have

already referred between Colonel McCausland and his brother-in-law Mr. Thompson—or Mr. Thompson McCausland as I must now call him—at the Bank of England in November, 1939. As I have said, I entirely accept Mr. Thompson McCausland's account of that interview as indeed I entirely accept the whole of his evidence. He was a witness of outstanding quality, obviously a gentleman of first class business competence, and in my judgment a gentleman of the very highest standard of honour and integrity. Mr. Thompson McCausland told us that at the November, 1939, interview he recollected that the so-called "religion" clause in the re-settlement had been read out when his own marriage settlement was signed and advised Colonel McCausland to look into it before he took any action in regard to changing his religion. Mr. Thompson McCausland, however, it is fair to say, did not then recollect the exact terms of the clause. He tells us that he thought that if Colonel McCausland changed his religion the property would go to his son; it never occurred to him that it would come to his (Mr. Thompson-McCausland's) family.

The upshot of this is that I must be satisfied that in November, 1939, Colonel McCausland's attention was pointedly called to the existence of a "religion" clause in the re-settlement in a manner which one would have thought would have put him on enquiry as to the contents and provisions of the clause. But I do not think that I would be justified in holding, as was hinted in the argument, that the reason why Colonel McCausland abstained from enquiry was because he was already familiar with the terms of clause 15. I think the true explanation most probably is that he was in such an unsettled state at the time that Mr. Thompson McCausland's wise and excellent advice just simply failed to sink in.

Colonel McCausland was received into the Roman Catholic Church on the 3rd May, 1940, and this fact became known to the Trustees of the Settlement and the other parties concerned in the month of September, 1940. The question then arose as to what was to be done. Mr. Ingram had fully explained the nature

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and effect of clause 15 to Colonel McCausland at their interviews in August, 1940. The trustees apparently were advised that the clause was valid and that the forfeiture had taken effect. And Colonel McCausland also took legal advice both in England and in Northern Ireland. Mr. and Mrs. Thompson McCausland found themselves in a most uncomfortable situation which was certainly not of their own choosing and which I am quite satisfied they most earnestly and sincerely wished had never arisen. Then ensued suggestions and negotiations which I need not attempt to go through in detail. The parties were on the most friendly terms and I am satisfied that they were all anxious to do anything they could to arrive at some solution of the difficulties. Two possible lines of action seemed open, the one that Colonel McCausland should institute proceedings in the courts to have the re-settlement either set aside or else rectified by deleting the forfeiture clause, and the other that some friendly arrangement should be arrived at whereby Mrs. Thompson McCausland would not exercise her rights under the clause and their son would relinquish his claim to the inheritance after he came of age. This latter course it was thought would also necessitate some application to the court presumably for the purpose of approving the arrangement. After consideration, however, Mr. and Mrs. Thompson McCausland realised that an arrangement on these lines was not a practicable, nor indeed a proper proposition, and they made it clear in the letter of the 9th September, 1941, that there was no middle way between accepting the re-settlement and going to the court to have it set aside. At the end of that letter Mr. Thompson McCausland said that he thought they should get the main point settled one way or the other as soon as might be and told Colonel McCausland that Mr. Ingram had said that if he did decide to go to the court he should do it soon, as otherwise he might prejudice his case by apparent acquiescence. I think this was both good sense and good law. As was pointed out in *Wright v. Vanderplank* (1) and *Turner v. Collins* (2) the courts

(1) (1856) 8 De G. M. & G. 133.

(2) (1871) L.R. 7 Ch. 329.

in a case of this type expect the party who conceives he has been injured to decide within a reasonable time after discussing the exact position what steps, if any, he is going to take in order that the other persons affected may know what line of conduct they are to adopt in regard to the matter. The whole tenor of Colonel McCausland's reply of the 14th September, 1941, was that having taken the best legal opinion which he could get he was not disposed to bring an action, but in a curious phrase went on to say that if the law changed or the administration of it in that part of our country ceased to be in the hands of those who now control such matters, he would appeal the case supposing it to go against him. This letter of the 14th September, 1941, was not, of course, in its terms conclusive. Moreover, it was written not to the trustees but to Mr. Thompson McCausland. The trustees were naturally becoming anxious that some definite decision should be taken. On receiving a letter, dated the 5th September, 1941, from Messrs. Charles Russell & Co., Colonel McCausland's English solicitors, returning some documents which they had lent them, Messrs. Martin, King, French & Ingram wrote in reply on the 8th September enquiring whether they might assume that Major McCausland (as he then was) had decided not to institute the proceedings which he was at one time contemplating. On the 18th September Messrs. Charles Russell & Co. replied saying that they did not think that Major McCausland had come to a final decision on the matter. Meanwhile Colonel McCausland had been in touch with his sister and her husband from time to time, and refreshing his memory from a letter which he himself wrote to Mr. Ingram, Mr. Thompson McCausland is able to say that on the 1st November Colonel McCausland informed him that he was not going to take proceedings. On this, as on all other points, I accept Mr. Thompson McCausland's evidence. Colonel McCausland apparently did not notify this to the trustees, with whom, however, Mr. Thompson McCausland was in communication. In his letter of the 23rd October to Colonel McCausland, Mr. Thompson McCausland told

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him that he had written to Mr. Ingram telling him that Colonel McCausland was deciding whether to bring an action in the Ulster Courts or not. Then in a letter of 17th November, a little more than a fortnight after Colonel McCausland had informed him that he was not going to take proceedings, Mr. Thompson McCausland said: "So would you write as soon as you can to "Ingram (if you still think fit) and say that you are "not going to bring an action but accept the settle- "ment." Apparently upon receiving this letter Colonel McCausland wrote to Mr. Ingram the vitally important letter of 18th November, 1941, saying: "I am writing "to tell you that I no longer feel myself in a position "to bring an action in the courts against the re- "settlement of 1927. I do wish, however, to make it "perfectly clear that by 'accepting' the settlement I "hope to make things easier for you and the other "trustees, and I do not wish to prejudice any re- "opening of the case by me or my descendants at some "future and more favourable time." On the 25th November Mr. Ingram replied, saying: "I am glad "that you will not proceed with the suggested applica- "tion to the courts for the alteration of the settlement "which I always felt sure could not be successful and "would necessarily have led to the expenditure of very "large sums in legal costs."

From this time it appears to have been assumed by all the parties that after having been fully advised by his own solicitors and counsel as to his chances of success in proceedings to have the re-settlement set aside or rectified, Colonel McCausland had now definitely abandoned the idea of instituting any such proceedings, and accordingly the parties began to arrange for the change over consequent upon the view that he had reconciled himself to the position that the forfeiture clause was valid and binding and that it had taken effect. Accordingly Mrs. Thompson McCausland went into receipt of the rents and profits of the properties and the receipt of the income of the investments. The parties were all on the most friendly terms and were all concerned to make the change as little difficult as possible. Mrs. Thompson McCausland

purchased furniture, stock, crop and implements from Colonel McCausland and paid him a sum of slightly over £9,000 in respect of these. It was no doubt part of the arrangement that Colonel McCausland could repurchase the furniture, stock and implements at the same valuation if he ever came back as owner into possession of the properties. What the parties had in mind was the possibility that some day in the future after Mr. and Mrs. Thompson McCausland's eldest son came of age and was able to decide for himself he might perhaps be willing to enter into some arrangement by means of which Colonel McCausland and his children might be restored to the family estates. It was recognized, however, that this was a matter which could only be decided far off in the future, that nothing could be justified which could be interpreted as an attempt to bind or to put moral pressure upon Mr. and Mrs. Thompson McCausland's son, and that all that could now be said was that after the boy came of age a new situation would arise when it was at any rate conceivable that something might possibly be done by arrangement which at the present time was clearly impossible. I think that Mr. and Mrs. Thompson McCausland went into possession on the clear understanding that they might safely take this step and incur all the trouble and difficulties it involved because Colonel McCausland had definitely decided not to institute proceedings to challenge the re-settlement. I think they took the view, and were entitled to take the view, that so far as Colonel McCausland was concerned they could definitely go into possession of the estate subject to the whole position being reviewed in a friendly way and perhaps some amicable agreement being arrived at after their eldest son became competent to consider whether he would be willing to enter into any arrangement such as Colonel McCausland obviously hoped for. I think that Mr. Thompson McCausland would also be willing to concede that it would have been no breach of the understanding upon which he and his wife went into possession if Colonel McCausland instituted proceedings if ever the law changed or the administration of it in this part of our

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country ceased to be in the hands of those who now control such matters, to quote the phrase used in the letter of the 14th September, 1941. No one ventured to explain in evidence—or indeed was asked—what this phrase was intended or understood to mean. Mr. Thompson McCausland said that he had an understanding in his own mind as to what it meant. But from his evidence and his attitude he was obviously of opinion that the circumstances contemplated by the phrase had not occurred. And I do not see that I have anything before me upon which I could legitimately hold that these circumstances had occurred when the plaintiffs instituted their action. Colonel McCausland's view is that the arrangement under which his sister and her husband went into possession was a mere temporary arrangement and that he had reserved liberty to himself to bring an action attacking the validity of the settlement at any time. I cannot accept this view. Once he had discovered the true facts and had been advised as to his legal position I do not think that Colonel McCausland was entitled to keep the matter unsettled in this way apparently for an indefinite period. It is to be remembered that the mere assertion of a claim, unaccompanied by any act to give it effect, will not serve to keep alive a right which would otherwise be barred *Clegg v. Edmondson* (1), *Lehmann v. McArthur* (2). I do not think that Mr. and Mrs. Thompson McCausland would have gone into possession and taken the steps which they did take if they had thought the arrangement was a mere temporary arrangement and that Colonel McCausland, notwithstanding all he had said and done, might still institute proceedings to re-open the question of the validity of the re-settlement at any time. Not only did Mrs. Thompson McCausland go into possession but she paid Succession Duty—£333 11*s.* 9*d.* in respect of the personal estate, and £131 16*s.* 4*d.* in respect of the real estate—on the basis that the forfeiture had taken effect while Colonel McCausland on his part claimed for and was repaid Succession Duty amounting

(1) (1857) 8 De G. M. & G. 787.

(2) (1868) L.R. 3 Ch. 496.

to £65 2*s.* 2*d.* by the Ministry of Finance on the same basis, having made on the 8th May, 1942, an affidavit deposing that it had now been discovered that by reason of a forfeiture clause contained in the re-settlement his succession had extended only to the 3rd May, 1940. Moreover, in 1942 Mr. Thompson McCausland took the necessary steps to assume the name and arms of McCausland. Although this was done without consultation with Colonel McCausland yet I feel sure that Mr. Thompson McCausland would not have taken this step if there was any idea that Mrs. Thompson McCausland's taking over of the properties was to be regarded as only temporary or provisional. Then in the same year a charge was created on the demesne lands by the trustees by deed dated the 25th June, 1942, for a sum of £6,000 which by clause 13 of the re-settlement had been directed to be raised for the benefit of Miss Eileen Mary McCausland in the event of Mrs. Thompson McCausland becoming entitled in possession to the settled lands. Again in the latter part of 1942 certain lands in the neighbourhood which Colonel McCausland owned personally but which could be conveniently worked and managed in conjunction with the lands comprised in the re-settlement and by the persons in possession and control of those lands were sold and conveyed by Colonel McCausland to the trustees of the re-settlement for a total consideration of £2,688. All these transactions point strongly against the view that Mr. and Mrs. Thompson McCausland had gone into possession on foot of a temporary arrangement which was merely to continue until some vague and undefined time when Colonel McCausland or his heirs, if they thought the occasion opportune, might possibly bring proceedings to have the settlement set aside or amended. After hearing the evidence and perusing and considering the correspondence, I feel that I must come to the conclusion that the trustees and Mr. and Mrs. Thompson McCausland inferred and legitimately inferred from what Colonel McCausland said and did that after getting the best legal advice that he could he had reconciled himself not to attack the validity

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of the re-settlement or the enforceability of clause 15, subject perhaps to the possibility—what the parties I am sure must have regarded as the very nebulous possibility—of a change in the law or its administration, and that the hope which he still naturally cherished of a return of himself and his family to Drenagh as owners, was the hope of a return at some time in the future under a friendly arrangement with parties entitled under the re-settlement who might be wishful to undo either in whole or in part what had been effected in regard to Colonel McCausland and his family by clause 15. I think that it was on this basis that Mr. and Mrs. Thompson McCausland acted as they did and I am accordingly of opinion that the court, upon the principle laid down in such cases as *Wright v. Vanderplank* (1) is precluded from granting to Colonel McCausland the relief which he seeks in these proceedings.

This, however, does not necessarily conclude the whole action. Colonel McCausland's eldest son, Marcus Edgcumbe McCausland, is joined with him as a co-plaintiff. Has he any separate right of action and if so is his legal position in any way different from his father's ? In the argument before me these questions were merely adverted to and were not discussed at any length. To me, however, they seem to be questions of importance. Can a person other than the settlor himself who claims under a settlement sustain an action to have it set aside or rectified on such grounds as those alleged in the present case ? And if he can sustain such an action is he liable to be defeated by laches or acquiescence on the part of the settlor ? Unfortunately so far as I have been able to discover it is difficult to find authority precisely in point.

Take the case of a settlor in the position in which Colonel McCausland found himself in 1927 executing a settlement in which there was inserted (perhaps quite innocently) without his knowledge some drastic provision which the settlor never intended, and which if it had been brought to his attention, he would have entirely disapproved. And suppose that the settlor

(1) (1856) 8 De G. M. & G. 133.

died a few weeks after executing the settlement and without having become aware of the objectionable clause. Can it be that the remainderman who then came into possession would be irretrievably bound by the clause and could take no steps to get it deleted even though all the facts regarding its insertion could be established beyond yea or nay? This would indeed be strange. In *Barstow v. Kilvington* (1), a marriage settlement was reformed on the ground of mistake at the suit of the younger children of the marriage after the death of both the husband and the wife, against the heir of the wife who claimed the reversion under the terms of the settlement as drawn. And in *Thompson v. Whitmore* (2), Page Wood V.C., and in *Weir v. van Tromp* (3), Byrne J., were prepared to recognize the right of a volunteer claiming under a settlement to institute proceedings to have a mistake in the settlement rectified. If the courts will grant equitable relief by way of rectifying a settlement on the ground of mistake to a person claiming under the settlement but who was not one of the original parties to it and is merely a volunteer and not, as the phrase goes, within the consideration of the settlement, I see no reason why they should not grant relief to such a person where the equity which he seeks to enforce is not a claim to have the settlement rectified on the ground of mistake, but a claim to have it rectified on such a ground as that set up in the present action. If this view is correct it follows that the minor plaintiff had a sustainable cause of action on foot of the matters put forward in the present proceedings. Has he lost that right of action through the laches and acquiescence which I have held must be imputed to his father? It is of course well established that a person cannot be fixed with laches or acquiescence until he is fully cognisant of his rights, or at any rate of the facts and circumstances giving rise to them. On the evidence given in this case, I could not hold it to be established that Colonel McCausland was fully aware of the true nature and effect of the forfeiture clause until the

(1) (1800) 5 Ves. Jun. 593.
(2) (1860) 1 J. & H. 268.
(3) (1900) 16 T.L.R. 531.

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summer of 1940. At that time the minor plaintiff was already in esse—he was born on the 8th September, 1933—and if I am correct in my view of the law a suit could then have been instituted on his behalf to have the re-settlement rectified. Has he lost the right to institute such a suit by reason of laches or acquiescence either on his own part or on the part of his father? As regards himself, laches or acquiescence is not to be imputed to a person while he is under the disability of infancy *March v. Russell* (1), nor is an infant son concluded by acquiescence on the part of his father *Watson v. Toone* (2). Laches or acquiescence is merely a personal bar to the claim of the particular individual who has been guilty of it to obtain from a court of Equity the relief to which that court would have held him entitled if it had not been for his laches or acquiescence. I do not think that a person entitled in remainder—especially an infant—could justly be held bound by the laches or acquiescence of the tenant for life, see *Butler v. Carter* (3). Accordingly in my view the minor plaintiff has not lost the right which I believe he had to sustain the action and I will make a declaration that he is not bound or affected by the provisions of the forfeiture clause.

Colonel McCausland's wife, Mrs. Margaret Louisa McCausland, is also joined as a plaintiff in the action and in the fourth clause of the claims for relief subjoined to the statement of claim there is a claim (made presumably on her behalf) that the forfeiture clause does not apply to the jointure rentcharge appointed to Mrs. McCausland (in the event of her surviving her husband) by the marriage settlement of the 6th June, 1932. I do not see on what ground it could be contended that the forfeiture clause applied to this jointure rentcharge, but in case there may be any doubt on the matter I am prepared to make a declaration that clause 15 in the re-settlement does not affect this jointure rentcharge.

The same clause of the claims for relief in the statement of claim asks for a declaration that the

(1) (1837) 3 My. & Cr. 31.
(2) (1820) 6 Madd. 153.
(3) (1868) L.R. 5 Eq. 276.

forfeiture clause does not apply to the properties described in the second parts of the Second and Third Schedules to the re-settlement. I confess that I find a difficulty in following this claim. It would appear to be based upon the fact that clause 15 in its terms only professes to deal with the settled freeholds. But clause 22 of the re-settlement directs that the capital moneys specified in the second parts of the Second and Third Schedules are to be held upon trust to be invested in the purchase of freehold lands to be settled to upon and subject to such of the uses, trusts, powers and provisions declared and contained in the re-settlement of and concerning the settled freeholds as shall be subsisting and capable of taking effect. This as a matter of construction would clearly make the provisions of clause 15 applicable to the capital moneys specified in the second parts of the Second and Third Schedules to the re-settlement.

The only point remaining for consideration is whether a distinction is to be drawn between the hereditaments and premises described in the First Schedule to the re-settlement of the 4th August, 1927, on the one hand and the properties and capital moneys described in the Second and Third Schedules on the other hand. It will be remembered that the hereditaments and premises described in the First Schedule were Mr. Maurice Marcus McCausland's own absolute property at the time of the re-settlement, and that Mr. Connolly Robert McCausland had then no estate or interest whatever in those properties. Mr. Maurice Marcus McCausland was under no compulsion to settle these properties on his son. If he chose to settle them he could settle them upon whatever terms he pleased. And from clause 1 of the re-settlement itself it will be seen that he alone was the grantor to bring these properties into settlement. It could accordingly be contended that as these properties belonged to Mr. Maurice Marcus McCausland alone the terms upon which he chose to settle them were his business alone, that if he chose to impose such a provision as that contained in clause 15 in settling his own properties he was fully entitled to do so without any reference to or consent from his son,

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and that accordingly neither his son nor the persons entitled in remainder under the re-settlement could now be entitled to quarrel with or to seek to get rid of clause 15 in so far as it purported to affect the hereditaments and premises described in the First Schedule to the re-settlement. From the entry in Mr. Ingram's diary of the 19th August, 1940, it appears that this was the view taken by Mr. Ingram when discussing the matter with Colonel McCausland on that date. I do not, however, think that such a contention is sound. It endeavours to split up the transaction embodied in the re-settlement of the 4th August, 1927, into two separate transactions, a settlement by the father alone of the hereditaments and premises described in the First Schedule and a settlement by the father and son of the properties and capital moneys described in the Second Schedule. I do not think that the transaction can be split up in this way and the settlement of the hereditaments and premises comprised in the First Schedule treated as a unilateral transaction on the part of the father with which the son had no concern. I think that the whole re-settlement is to be viewed as one transaction in which if the father brought in much of value the son also conceded much of value. Not only did the son submit to the curtailing of his reversionary estate in the inheritance of the properties and capital moneys described in the Second and Third Schedules in the manner usual upon a re-settlement, but he consented in addition to the withdrawal from the funds of which he was tenant in tail in remainder of a sum of £11,421 7*s.* 8*d.* (nominal) Guaranteed three per cent. Stock mainly for the purpose of providing allowances for his two sisters. I think that the consent of the son to the withdrawal of this sum from the settled funds could legitimately be regarded as some *quid pro quo* for his father bringing into settlement the hereditaments and premises described in the First Schedule. And indeed it was so spoken of in Mr. Ingram's letter of the 4th August, 1927, to Mr. Connolly McCausland. Accordingly I do not think that the settlement of the properties comprised in the First Schedule can be

divorced from the rest of the transaction and treated as a separate unilateral transaction on the part of Mr. Maurice Marcus McCausland. In my opinion the whole settlement of the properties comprised in all Three Schedules is to be regarded as one settlement with consideration passing from both sides, and if this view is correct it would seem to me that the plaintiffs have or had the same right to challenge clause 15 so far as it relates to the properties comprised in the First Schedule as they might have to challenge it so far as it relates to the properties comprised in the other two Schedules.

I therefore propose to make :—

(1) a declaration that in the events which have happened the plaintiff Connolly Robert McCausland is precluded from contending that the provisions of clause 15 contained in the Indenture of Re-Settlement of the 4th August, 1927, do not apply to or affect his life estate in the properties comprised in that settlement and that in so far as the said provisions purport to affect his life estate in the said properties they are to be regarded as valid and effective ;

(2) a declaration that as from the 3rd May, 1940, the hereditaments and premises and capital moneys comprised in the said re-settlement of 4th August, 1927, are to be treated during the remainder of the life of the plaintiff Connolly Robert McCausland as being held to the uses and upon the trusts and subject to the powers and provisions to and upon and subject to which the same would have stood limited and settled by virtue of the said re-settlement if the said Connolly Robert McCausland were dead without issue ;

(3) a declaration that the said clause 15 in the said Indenture of Re-Settlement of 4th August, 1927, is not binding on the plaintiff Marcus Edgcumbe McCausland ;

(4) an order that the said Indenture of Re-Settlement of 4th August, 1927, be rectified in accordance with the foregoing declarations.

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And I will also make :—

(5) a declaration that the provisions of the said clause 15 in the said Indenture of Re-Settlement of 4th August, 1927, do not apply to the jointure rentcharge appointed to the plaintiff Margaret Louisa McCausland (in the event of her surviving her husband) by the Marriage Settlement of 6th June, 1932.

Solicitors for the plaintiffs : *John K. Currie & Son.*

Solicitors for the trustees : *Martin, King, French & Ingram.*

Solicitors for Helen Laura Thompson McCausland and Eileen Mary Stronge : *Babington & Croasdaile.*

Solicitor for Marcus Perronet Thompson McCausland: *E. G. C. Brown.*

Solicitors for other defendants: *Eric Morrow* and *J. B. O'Neill.*

J. McC.

RUSSELL (INSPECTOR OF TAXES) v. SCOTT (1).

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Nov. 25, 26, 1947.

Jan. 15.

H.L. 1948.

April 7, 8, 9, 13, 14; May 13.

Revenue—Income tax—Sand-pit opened in farm-land—Sand sold by landowner—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. A No. III, r.* 3—"*Other concerns of the like nature.*"

A landowner working his land as a farm permitted another to open a sand-pit on the land and sold the sand therefrom over a period of years.

Held, by the House of Lords, affirming the decision of the Court of Appeal in Northern Ireland (Andrews L.C.J., Babington and Porter L.JJ.) that the landowner was not carrying on a "concern" of the like nature" within rule 3 of No. III of Schedule A to the Income Tax Act, 1918.

Mosley v. George Wimpey & Co. Ltd. [1945] 1 All E. R. 674; 27 Tax Cases 315 overruled.

Edmonds v. Eastwood (1858) 2. H. & N. 811 approved.

APPEAL by the Crown from the decision of the Court of Appeal in Northern Ireland dismissing an appeal from Black J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The respondent was the owner in fee simple of a farm in the County of Londonderry under a portion of which there was sand in considerable quantities. At the end of 1940 there was a demand for sand in connection with the construction of aerodromes, and the respondent gave permission to Moore, a contractor, to open a sand-pit on the farm. Between January, 1941, and October, 1944, by which time the pit was practically exhausted, more than 100,000 tons of sand were excavated and sold by the respondent to Moore and other contractors. The respondent did not himself dig the sand, which was excavated and removed by the contractors' servants. The contractor Moore had a man named Harvey in his employ, and the respondent entered into an agreement by which Harvey checked the tonnage taken by Moore and the other contractors, and generally supervised the pit. There was a regular system of rendering accounts and receiving payments.

(1) In the Court of Appeal before Andrews L.C.J. and Babington and Porter L.JJ.

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The Special Commissioners confirmed assessments on the respondent in respect of his profits derived from the sale of the sand but stated a case for the opinion of the High Court, and appeals were taken to the Court of Appeal (reported at [1944] N.I. 57) and the House of Lords (reported at [1945] N.I. 47). The House of Lords discharged the case stated and all subsequent orders (except as to costs) and remitted the assessments to the Special Commissioners to rehear and, if so requested, to state a fresh case.

At the rehearing the Special Commissioners reconfirmed the assessments subject to the figures being settled between the parties, which figures were subsequently agreed at £150 for 1940-41 ; £1,250 for 1941-42 ; and £3,750 for 1942-43. The Special Commissioners found that the sales of sand were by way of trade, that they were not merely casual and occasional but constituted a series of transactions carried out in pursuance of a regular method, and arrived at the conclusion that the sand-pit was a concern carried on by the respondent, and following the decision of the Court of Appeal in England in *Mosley v. George Wimpey & Co. Ltd.* (1), they held it to be a concern of a like nature with those enumerated in rule 3 of No. III of Schedule A.

A fresh case having been stated by the Special Commissioners for the opinion of the High Court the appeal came before Black J. who considered himself bound by the views of the Court of Appeal in the earlier proceedings (reported at [1944] N.I. 57) and accordingly allowed the appeal.

The Crown appealed to the Court of Appeal.

Curran K.C., Topping K.C. and *Harrison* for the Crown.

McCoy K.C. and *McVeigh* for the respondent.

Cur. adv. vult.

(1) [1945] 1 All E.R. 674 ; 27 Tax Cases 315.

ANDREWS L.C.J. : This is an appeal from an order of Black J., dated the 26th June, 1946. The Notice of Appeal asks that the said order may be set aside, and that in lieu thereof an order may be made allowing the said appeal and adjudging that the respondent, David Scott, the owner of a sand-pit, was and is assessable to Income Tax under Schedule D. of the Income Tax Act, 1918, for the years 1940-41, 1941-42 and 1942-43 in respect of income received from sales of sand.

The matter came before Black J. on a case stated under section 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts. It was the second case stated by the Commissioners raising the issue as to the respondent's liability to such assessment, the main contention on behalf of the appellant Russell, one of His Majesty's Inspectors of Taxes, being in each case that the said sand-pit was a " concern of the like nature " with those enumerated in rule 3 of No. III of Schedule A to the Income Tax Act, 1918, and assessable as such. When the matter came before this court on the first case stated the decision of the Special Commissioners discharging the assessments was affirmed, but on wholly different grounds from those relied upon by the said Commissioners. We were unanimously of opinion that the respondent's sand-pit was not a " concern " of the like nature " within rule 3 of No. III of Schedule A. On the question of whether or not it was a " concern," all the members of the court referred to the meagre character of the particulars set out in the case. I myself stated (1) that I did not find in the case sufficient material to enable me to form a definite opinion as to whether or not this particular sand-pit would be aptly designated a " concern " ; and I called attention to the absence of any express finding of fact on the subject by the Special Commissioners (2), as also did Murphy L.J. (3).

When the matter reached the House of Lords on appeal from our decision an even stronger view was

(1) [1944] N.I. 57, 60.
(2) Ibid. 61.
(3) Ibid. 73.

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taken by the House, the Lord Chancellor, Lord Simon, stating, with the full concurrence of all the other learned Law Lords, that it was quite impossible for the House to decide whether the sand-pit was a "concern of the like nature" within rule 3 on "the "scanty materials before it." "The House," he said, "ought to be furnished with adequate information." Accordingly, the order of this court and of the High Court (except as to costs) was discharged "without "pronouncing on the correctness or otherwise of the "opinions therein appearing." The assessments, he said, would be restored, but the appeal against the assessments would be remitted to the Special Commissioners for them to rehear, and, if so requested, to state a fresh case for the opinion of the High Court. The Lord Chancellor then stated with considerable particularity the matters which a properly drawn case would include, amongst them being "the conclusions "of fact drawn from the evidence." So far, he continued, as the conclusion arrived at by the Commissioners was a conclusion of law it would be subject to appeal. "The question whether it was a concern "of the like nature involves the construction of the "rule which we are not at present called upon to "undertake to pronounce."

The fresh case so authorised was duly stated and is before us. No one has seriously criticized its form, and no one can fail to recognise the additional wealth of detail which it contains. I think it right to say at once that the contentions put forward on behalf of the Inspector (alternatively to the main contention) that the sand-pit was a quarry of stone within the meaning of rule 1 of No. III of Schedule A., or a mine within the meaning of rule 2 of No. III of that Schedule, were not ruled upon by the Commissioners when giving their decision, and they were expressly abandoned by Mr. Curran during his argument in this court. Accordingly, the sole issue which now calls for determination is whether the respondent's sand-pit is a "concern of the like nature" within rule 3.

The first point which naturally arises is whether the sand-pit is a "concern." Upon this question I refrained

as above stated, from expressing any opinion on the hearing of the former case stated having regard to the insufficiency of the facts then before us. As I read the learned Lord Chancellor's judgment I think he obviously regarded this as a question largely, if not indeed entirely, of fact, upon which the Commissioners were invited to state their conclusion on the evidence. They have done so, holding in clear and unmistakable terms that "the sand-pit was a concern." In my opinion there was ample evidence before the Commissioners to justify this finding, and it is one which cannot and should not be disturbed by us. Accordingly, I accept it without reserve or qualification.

There only remains to be considered the question whether it is a concern "of the like nature" with those enumerated in rule 3. Here it appears to me that neither has the court nor have I personally the same freedom as upon the question of a "concern," as both Murphy L.J. and I, after giving the matter the best consideration that we could, expressed the conclusion that this sand-pit was not "of the like nature" within the rule. The third member of the court, Babington L.J., found it unnecessary to express any opinion upon this issue having arrived at the definite conclusion that the sand-pit, on such evidence as was then forthcoming, was not a "concern." I expressed my inability to find a genus common to all the enumerated concerns, and consequently none which could also be shared by a sand-pit; whilst Murphy L.J. was equally unsuccessful in finding any individual concern of those specially enumerated with which a sand-pit could be said to have a common genus. "It has not," he said, "been very strenuously argued on behalf of "the appellant that the words 'other concerns of the "'like nature' should be related not to a preceding "genus but to the several enumerated 'concerns,' "but, even if such a construction could be adopted, "I do not think that this sand-pit is 'of the like "'nature' with any of the enumerated 'concerns'." (1).

Since these judgments were delivered only one new circumstance of importance has arisen which calls for

(1) [1944] N.I. 57, 74.

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consideration. This is the decision of the Court of Appeal in England in *Mosley v. George Wimpey & Co. Ltd.* (1), reversing the decision of Macnaghten J., in which, the extraction by the appellants, a firm of contractors, of gravel from the respondent's land was held to be a " concern " within the meaning of Schedule A., No. III, rules 1, 2 and 3. Tax was, accordingly, held to have been rightly deducted from the rent which the appellants had paid to the respondent. The Crown was not a party to the action, but the then Attorney-General (Sir Donald B. Somervell K.C.) and Mr. Reginald P. Hills appeared as *amici curiae*. The conclusion arrived at by the court was unanimous, but all three members of the court, Scott and du Parcq L.JJ. and Uthwatt J., adopted different lines of reasoning. Scott L.J. considered that the intention of Parliament was plain—that every form of real property should be included in its tax on annual value, and that the generic words in rule 3 of No. III should, accordingly, be interpreted widely, and not restricted to a meaning generally similar to one or other of the specific concerns enumerated. The main function or purpose of No. III was, he considered, to throw a wide net around a variety of properties, the nature of which made rackrent an impracticable measure of annual value. The common characteristic of them, he considered, is that a " concern " is extracting profits from particular land by some special form of user—a user other than what may be regarded as the normal user of land, such as agriculture, forestry, housing or other constructional development. Another generic conception which the learned Lord Justice also found in the " concerns " listed in No. III was their common feature of a variable economic yield, for that makes the rackrent an untrue or impracticable measure of annual value. These " generic characteristics," he held, applied to the gravel-pit from which the respondents had made their extractions ; and he also considered that it fell " within the heterogeneous list " of more specific concerns contained in rule 3." The

(1) [1944] 2 All E. R. 135 ; [1945] 1 All E. R. 674 ; 27 Tax Cases 315.

Lord Justice did not, however, name which one or more of the enumerated concerns was in its physical or other features "of the like nature with" a gravel-pit. My respectful comment on the views so expressed by the learned Lord Justice is that if the extracting of profits from land by "some special form of user" is the common feature of all "concerns" specified in rule 3 of No. III and so constitutes a concern a "concern "of the like nature," I am unable to understand the necessity for Rules 1 and 2: for the quarries and mines referred to in these rules are of course also "special "forms of user" of land, and methods of "extracting "profits" from land; and so, according to the Lord Justice's interpretation, would have been included in rule 3 without special mention, and taxable as such on a profits basis. Du Parcq L.J. next sought for the "nature" common to this heterogeneous list. He could not agree with Scott L.J. that it was to be found in the quality of bringing profit to the landowner. Neither could he accept the view that the genus to all the named concerns is a user of the land abnormal in the sense that it was outside the normal use of land for the erection of buildings, or for agriculture, or for pleasure or amenities. He rejected Lord Justice Scott's principle of the construction of a taxing Act. Likewise, he said that he was not completely satisfied with his own "final solution of the puzzle," namely, that each of the concerns mentioned in the rule must be supposed to have been intended to be typical of a class, for he could not see any way of fitting all the concerns into one class. "On this view," he concluded, "I find an indication in the inclusion of salt "mines and alum mines in the rule that profits made "by commercially dealing with mineral deposits on "or under the land are brought within it, and I am "prepared to agree that this gravel-pit is within "rule 3." Finally, there is the judgment of Uthwatt J., who expresses the opinion that "to be a concern there "must be in some real sense an undertaking carried "on with a view to profit"—"a business enterprise" —"a commercial undertaking"—and who also asserts that the gravel-pit of the company, which in his

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opinion satisfied these requirements, was one of the concerns specified in rules 1, 2 and 3 of No. III of Schedule A. The learned judge, as I read his judgment, simply views the matter from the commercial standpoint; he does not in terms discuss the true meaning of the words "concerns of the like nature"; nor does he, indeed, state whether the gravel-pit fell, in his opinion, within rule 1, rule 2 or rule 3. As it is only in the event of its falling within rule 3 that the construction of the words "concerns of the like nature" would have arisen, it would rather appear as if he must have inclined to the view that it fell within either rule 1 or rule 2 as a "quarry" or "mine."

It has been necessary for me to examine the judgments in *Mosley's Case* (1) in a somewhat critical spirit in order to justify expression of the view which I have formed that they are not convincing. All the members of the court appear to have experienced difficulty and to have entertained much doubt. Du Parcq L.J., indeed, refers to "the melancholy ob-"scurity" of the rule. Moreover, all the judgments proceed on different grounds; and this is not wholly surprising when we bear in mind the various judicial interpretations of the words "concerns of the like "nature" to be found in earlier authorities, to several of which I referred in my judgment upon the previous case stated in this matter (2). Thus, the views have been variously expressed that to fall within rule 3: (*a*) the concern must be a company; (*b*) that the land on which the concern is situate must be used in connection with trade or for purposes of trade, but that it is also very difficult to separate the income of the proprietor into rental and commercial profits; (*c*) that the concern must have some connection with land; (*d*) that it must have profits in some way arising out of land or interests in land; and (*e*) that it must be of a public utility character. Again I would point out that Lord Buckmaster's opinion that rule 3 has a "narrow "foundation" appears to me to support Lord McLaren's view that one must be careful not to give too wide an extension to the general words of rule 3; but at the

(1) [1945] 1 All E. R. 674. (2) [1944] N.I. 57, 62-67.

same time it seems to me to be in direct conflict with the view of Scott L.J. that "the generic words should ". . . be interpreted widely, and as disclosing an "express intention of Parliament to sweep into the net "every concern of the general character I have en- "deavoured to describe above." With such conflict of opinion it is not altogether surprising that it has been held that a brickfield does not come within rule 3, *Edmonds v. Eastwood & others* (1), whilst a public cemetery does, *Edinburgh Southern Cemetery Co. v. Kinmont* (2).

Such is the unsatisfactory state of the law more than a century after the words were enacted in practically their present form in the Income Tax Act of 1842. I can only say that in seeking to impose this charge upon the subject the Crown have failed to satisfy me that it is imposed by "the clear and unambiguous "language" required by Bailey J. in *Denn & Manifold v. Diamond* (3), or in "the plain terms" which Lord Buckmaster regarded as essential for the imposition of a tax: *Ormond Investment Co. v. Betts* (4).

In these circumstances I hold that the appeal must be dismissed with costs.

BABINGTON L.J. [after setting out the facts and the findings of the Special Commissioners]:

The first question to be decided is whether Scott was carrying on a concern.

On the facts stated in the former case I was of the opinion that there was no evidence that he was carrying on a concern but am now compelled to reconsider this question upon the new facts and the express finding of the Special Commissioners that the sand-pit was a concern.

Speaking generally, the term "concern" can be applied to a great number of activities, but to constitute a concern I think there must always be an entity of some kind, and what must be looked for is a concern with an entity approximating to those enumerated in rule 3. What is the entity constituting this

(1) (1858) 2 H. & N. 811.
(2) (1889) 2 Tax Cases 516.
(3) (1825) 4 B. & C. 243, 245.
(4) [1928] A.C. 143, 151.

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alleged concern ? The Special Commissioners say in paragraph 19 of the case : " We arrive at the conclusion " that the sand-pit was a concern carried on by the " appellant " (Scott) ; but as a sand-pit cannot of itself be a concern, being merely land the nature of which is sand, it can only become a concern by some action of the owner, his lessees or licensees. The Special Commissioners in paragraph 19 accordingly rely on :—

1. The sale of sand by Scott ;
2. The amount of these sales, i.e., more than 100,000 tons in three years ;
3. That they were not merely casual and occasional but constituted a series of transactions carried out in pursuance of a regular method.

The facts stated in this case are fuller but in my opinion they do not put the matter any further than the former case.

The sale of sand is not in itself sufficient to constitute a concern. All sales are by way of trade and no sale is casual. If there are many sales they are not occasional and must constitute a series of transactions, and be carried out in pursuance of a regular method, namely, selling to anyone willing to buy. Ringing the changes on the sales of sand will not make the pit a concern unless the law says that making a profit in this way constitutes a concern. As I see the facts set out in the case they all relate to sale and sale alone.

Scott was compelled to collect his charges, but he would have had to do this if he had been selling potatoes or some other agricultural produce, and the fact is neutral. He had to point out where the sand was to be taken. If he had sold a cow he would have had to point her out in the field or byre either personally or by an employee, and this fact is also neutral. The issue therefore narrows itself down to a determination as to whether the sale of sand in large quantities producing profits constitutes not only this pit, but any pit from which sand is sold, a concern, and in my opinion the answer must be in the negative. I cannot find any material distinction between the facts in this case and those in the *Inland Revenue v. Lord Belhaven's*

and Stenton's executors (1), in which the Revenue attempted to assess the respondents under Schedule D and not under No. III of the rules applicable to Schedule A which Lord President Clyde held did not apply to the lands and heritages there in question. If sale does not of itself constitute a concern must a large number of sales and a considerable return do so ?

In order to answer this it is necessary to examine the Income Tax Acts generally, as Lord Greene says in *Croft v. Sywell Aerodrome Ltd.* (2).

Schedule A. as a whole contemplates profit and, as Lord Greene says, " an owner of land is deemed to obtain " income from his mere ownership and the occupier " of land is deemed to obtain income from his mere " occupation." The Master of the Rolls was dealing with a case in which the issue was whether the land-owner was to be taxed under Schedule A. or under Schedule D. in respect of profits derived therefrom, and he rejected the principle that even " a very large " excess of actual income over the assessed value " can determine the liability to tax (3). Similarly in this case the amount of the sales cannot determine whether this sand-pit was a concern, and if this factor be ruled out I cannot find any other evidence to sustain the finding of the Special Commissioners. These sales were therefore the exercise and exploitation of the owner's rights of property and the price obtained was the result of the sale of a capital asset and not profits within No. III, rule 3 of Schedule A. They were not the proceeds of an organised commercial operation, for Scott had no organisation of his own, and if there was any concern operating this pit it belonged to Moore the contractor.

Fry v. Salisbury House Estate Ltd. (4) was applied in *Croft's Case* (5). In that case the defendant company, who were the owners of a block of buildings, let out rooms unfurnished and provided a staff to operate the lifts and act as porters to watch and protect the buildings. They also provided certain services, such

(1) [1925] S.C. 635.
(2) [1942] 1 K.B. 317, 325.
(3) Ibid. 326.
(4) [1930] A.C. 432.
(5) [1942] 1 K B. 317.

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as heating and cleaning, at an additional charge. The Crown claimed that the company was carrying on a *trade* within the meaning of Case 1, Schedule D. Schedule A. No. III was not relied on but the premises were already assessed under Schedule A. The company admitted liability under Schedule D. in respect of the profits derived from cleaning and other services, but contended that so far as the proceeds of the property were concerned they had already been taxed under Schedule A. and could not be taxed again under Schedule D. Lord Atkin says: "Annual income "derived from the ownership of lands, tenements and "hereditaments can only be assessed under Schedule A. "and in accordance with the rules of that Schedule" (1). These cases show that an owner may make profits and still be assessable only under Schedule A. if they are derived from his property rights or his occupation of the land, and if the price obtained here was not the result of the sale of a capital asset but represented profits such profits were as certainly derived from Scott's property and occupation as the profits in the *Sywell Aerodrome* (2) and *Salisbury House* (3) *Cases*, and not from an independent concern.

Under Schedule A. an owner is assessed on the rackrent, or if the lands are not let at a rackrent, then the rackrent at which they are worth to be let by the year, i.e., the annual value. This tax is charged in respect of the property in all lands in the United Kingdom for every twenty shillings of the annual value thereof. And this measure applies unless the lands can be brought within Schedule A., No. III, as not to be charged according to the General Rule but by No. III, rule 8, according to the rules applicable to Schedule D.

I rule out the evidence set out in paragraph 13 of the case, which only amounts to this, that the Transport Board hired the lorry from Scott and in turn hired it to Moore; and Harvey, an employee of Moore's, drove it either for Moore or the Board. This transaction was an independent one and has no bearing on the

(1) [1930] A.C. 432, 454
(2) [1942] 1 K.B. 317.
(3) [1930] A.C. 432.

question as to whether or not the sand-pit was a concern, and for the reasons I have given I hold that there was no evidence to justify the finding of the Special Commissioners that the sand-pit was a concern.

It may well be that Moore carried on a concern which depended on his user of this sand-pit, but I can find no evidence to justify the finding of the Commissioners that Scott carried on any concern or did anything more than convert his sand into money, therefore the hereditament must be assessed under the general rule and No. III has no application.

I now come to the second point. Assuming that the sand-pit was a concern, was it a concern of the like nature with those enumerated in rule 3 ?

Reading Schedule A. as a whole, it would seem that the only *concerns* which the Legislature intended to take out of the general rule No. 1, Schedule A., are those of the like nature with the concerns enumerated in No. III, rule 3, and which produce profits, and such concerns must satisfy both conditions.

As I have said, profit element is not of itself sufficient to constitute a concern so as to bring the case within rule 3. If it were, every operation upon lands which produces profits would be a concern within the rule, and it is impossible to come to this conclusion because the whole of No. III, rules 1, 2 and 3, would have been unnecessary if this were so and would never have been cast in their present form. The entities dealt with in rules 1, 2 and 3, are therefore limited entities and must be so construed. Those included in 1 and 2 are named and present no difficulty. Similarly those in rule 3 present no difficulty until the words " other concerns " of the like nature " are reached, and these words must be construed with limitations to be gathered from what precedes them.

What is the nature of the preceding entities which the other concerns must share ? As I have pointed out, it cannot be that they make profits though when found they must fulfil this condition. It must therefore be something special in their physical nature which the " *other concerns* " also exhibit either directly or by very strict analogy.

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This, in my opinion, is what the Statute says, and the difficulty of construing it becomes comparatively simple if one does not attempt to read more into the rule than can be gathered from the plain meaning of the words used, bearing in mind that rule 3 contains exceptions to the general rule that land must be assessed according to the annual value and that if the hereditaments being assessed cannot be brought within the exception they will nevertheless be assessed under the general rule.

The case of *Mosley v. George Wimpey & Co. Ltd.* (1) was decided after the decision of this court on the case which has now been discharged. The facts were very similar to those in the present case, and the contractors, George Murphy & Co. Ltd., who extracted gravel from a pit belonging to Mosley, the plaintiff, on payment of tonnage rents, deducted income tax from the amount due by him to Mosley under section 21 of the Finance Act, 1934, alleging that the licence to extract the gravel was an easement and was used, occupied and enjoyed in connection with some of the concerns specified in rules, 1, 2 and 3 of No. III, Schedule A., so as to make the rent chargeable with tax under Schedule D. The case was tried by McNaghten J. (2), who held (1) that the payments made were "rent" payable in respect of an easement and this was affirmed by the Court of Appeal; (2) that on the true construction of Schedule A., No. III, rules 1, 2 and 3, the easement was not a "concern"; and (3) that the easement was not occupied or enjoyed in connection with the "concern"; and gave judgment for the plaintiff. On appeal the case turned on these three findings, Scott L.J. (3) saying that "the real dispute turned on two "issues (*a*) and (*b*), namely: (*a*) Whether there was any concern carried on by the appellants (George Wimpey & Co. Ltd.) within the meaning of No. III; and (*b*) Whether their enjoyment of the easement was in connection with it?"

The issues were therefore the same as in the present

(1) [1945] 1 All E.R. 674; 27 Tax Cases 315.
(2) [1944] 2 All E.R. 135.
(3) [1945] 1 All E.R. 674, 676.

case except that, it being held that there was an easement, the liability to tax was under section 21 of the Finance Act, 1934, and not under Schedule A. of the Income Tax Act, 1918.

Here there is no easement. This was conceded in argument before us and is negatived by the judgment of the House of Lords. The " concern " must therefore be itself a concern of the like nature with those enumerated in rule 3.

In *Mosley v. George Wimpey & Co. Ltd.* (1), the easement was held to be used in connection with the concern carried on by the defendants, who were the purchasers of the sand, and the liability to tax which was upheld in that case did not turn on anything done by the owner of the land but on whether his grantee was carrying on a concern unconnected with the gravel pit.

Section 21 appears to have been inserted in the Finance Act, 1934, to capture certain profits derived from land which theretofore had escaped taxation as being the result of the owner's exploitation of his rights of property, as in *Croft v. Sywell Aerodrome Ltd.* (2), *Fry v. Salisbury House Estate Ltd.* (3), and the present case, provided such profits arise from any land or easement used, occupied or enjoyed with any of the concerns mentioned in Schedule A., No. III. It is very obscure, but the Revenue apparently thought it covered cases such as this one for they originally made the case that Moore had an easement over Scott's lands, and the suggestion that Scott was himself carrying on a concern was an afterthought which arose when it transpired that the case could not be brought within section 21 of the Act of 1934. Here once more it is to be observed that if the Legislature intended to bring all revenue producing concerns within rule 3 this section would have been very differently worded. The Revenue authorities must have known all the relevant facts before they assessed Scott and the fact that they did not proceed directly under rule 3 in the first instance suggests that they were by no means confident that

(1) [1945] 1 All E.R. 674.
(2) [1942] 1 K.B. 317.
(3) [1930] A.C. 432.

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sand-pits were either concerns or concerns of the like nature within rule 3 so as to be taxable on the profits derived from them. Now assessment under Schedule D. having been ruled out by the decision in *Inland Revenue v. Lord Belhaven & Stenton's Executors* (1), and having failed in the attempt to prove the existence of an easement they have fallen back on Schedule A., No. III.

As I have said this legislation is very obscure in its application, but we cannot strain it against the taxpayer and must require the Revenue authorities to satisfy us as to his liability by reference to some statutory enactment which imposes it in terms which are clear and certain.

This sand-pit clearly does not fall within rules 1 or 2. It is neither a quarry nor a mine, and the fact that it is not mentioned in either of these rules suggests that it was not intended to be included in rule 3 for it is more nearly like in nature to the quarries and mines referred to in rules 1 and 2 than to the concerns named in rule 3 which it is said to be like and under which it is taxable only if it is a concern. I expressed no opinion on this branch of the case when it was first before us and feel bound by the decision of the other members of the court upon it unless the facts now found have changed the issue. I do not think they have, but having considered the question again and assuming that it has been established that Scott was carrying on a concern, I am not persuaded that it was a concern of the like nature with those concerns enumerated in rule 3. These concerns do not constitute a genus. They are exceptions and it was not necessary to make a comprehensive genus since any concerns omitted fall under the general rule.

In *Mosley v. George Wimpey & Co. Ltd.* (2), Scott L.J., however, says: "The generic words should for the "reasons which I have already stated be interpreted "widely, and as disclosing an express intention of "Parliament to sweep into the net every concern of "the general character which I have endeavoured to "describe above."

(1) [1925] S.C. 635.

(2) [1945] 1 All E.R. 674, 677; 27 Tax Cases 315.

I agree that Parliament intended to impose a charge in respect of the property in all lands by Schedule A., but when it becomes necessary to determine whether certain lands are to be charged under the general rule or not to be so charged because they fall within No. III, I think it is impossible to say that an express intention is disclosed to sweep into the net every concern of the general character indicated without making an assumption for which there is no foundation and which is negatived by the form of the Schedule A. III. That assumption is, in the words of Scott L.J., that the intention was "to throw a wide net around a variety "of properties the nature of which made rack rent "an impracticable measure of annual value." It may fairly be asked : what is the net which is said to hold these various properties together constituting them a genus embracing all properties the nature of which made rack rent an impracticable measure of annual value ?

It appears to be that they are all cases in which (1) profits are extracted from the land ; and (2) extracted by some special form of user. This was strongly pressed on us on behalf of the appellant but the short answer is that the Legislature has not so enacted. If Parliament had so intended it would have been a simple matter to say that all profits derived from land by some special form of user shall be taxed on the value of the produce thereof, and the fact that this was not done shows that the concerns named in No. III, rule 3, are exceptions from the general rule to be read distributively and not a generic class embracing all concerns which may be regarded as having profits from abnormal user of the lands. The latter conclusion cannot be arrived at without straining the words of the rule and making an assumption in favour of the Revenue which in my opinion is not warranted.

Moreover, it is impossible to define generally the normal user of land and what acts are an exercise or exploitation of the owner's or occupier's rights of property and what is special or abnormal. Clearly the mere making of profits is not the test even if these

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are largely in excess of the annual value—*Croft v. Sywell Aerodrome Ltd.* (1).

In *Mosley v. George Wimpey & Co. Ltd.* (2), the Court of Appeal held that the gravel-pit was a concern within Schedule A., No. III, but I have read the judgments in that case with respectful attention and I cannot find that there was any evidence that Mosley, the owner of the gravel-pit, who occupied the same relative position as Scott in this case, was carrying on a concern of the nature alleged. The Court of Appeal held that George Wimpey & Co. Ltd., the contractors, were carrying on a concern, which negatives the existence of another concern being carried on by the owner in connection with the same pit. The Special Commissioners have relied on the decision as an authority for this very proposition, but when it is examined it would appear to support a finding that George Wimpey & Co. Ltd. were carrying on a concern and that Mosley was not and was therefor wrongly assessed on his profits, there being no easement within section 21 of the Finance Act, 1934. The basis of the finding that the concern was of the like nature with those enumerated in No. III was therefore that it made profits and in my opinion this is not sufficient to bring it within rule 3, it not being in any other respect like in nature to any of the concerns there enumerated.

In *Mosley v. George Wimpey & Co. Ltd.* (3), du Parcq L.J., dealing with the words "and other con- "cerns of the like nature having profits," says: "What then is this common 'nature'? Certainly "not merely the quality of bringing profit to the "landowner, since to bring a profit-making concern "within the rule it must be shown that it is 'of the "'like nature' with the named profit-making con- "cerns," and he apparently with some hesitation came to the conclusion that each of the concerns mentioned in the rule must be typical of a class. He says: "This "is the only way in which I can give a meaning to the

(1) [1942] 1 K.B. 317.
(2) [1945] 1 All E.R. 674; 27 Tax Cases 315.
(3) [1945] 1 All E.R. 674, 680.

" words ' of the like nature,' for I cannot see any way " of fitting all the concerns into one class." He therefore rejects the test of " having profits " and reads the concerns mentioned distributively but, holding that each represents a class, brings in the gravel pit as being of the same nature as salt works and alum mines.

I think this construction is to some extent based on the assumption that the onus is on the taxpayer who admits having made profits to show that he is not liable to tax and it strains the words of the rule in favour of the Revenue. The Revenue must satisfy us that by clear words or necessary implication the Legislature has imposed liability and the whole course of this case and the authorities cited show that they are not in a position to discharge this onus.

This view is supported by the case of the *Duke of Fife's Trustees v. George Wimpey & Co. Ltd.* (1), a decision of the Scottish First Division. This case was decided on section 21 of the Finance Act, 1934, and the issue arose in the same way as in *Mosley v. George Wimpey & Co. Ltd.* (2), namely, on the right of the defendants to deduct income tax under that section. Its importance lies in the fact that no one suggested at any stage that the Duke of Fife's Trustees were carrying on a concern but it was assumed that if there was a concern it was carried on by the contractors.

The user of land is infinitely varied and cannot be said to be normal only when used for agriculture, forestry or building, so that all other user which produces profits must fall within No. III, rule 3.

Edinburgh Southern Cemetery Co. v. Kinmont (3), appears to be a decision to the contrary. There a Cemetery Company which derived profits from selling the use of grave plots in perpetuity was held to be assessable under rule 3 as being a concern of the like nature within the rule. Lord Shand says:

" At first sight the notion that a Cemetery Company " is a concern of the like nature with any of the others " is a little startling but the essential point of similarity " is this, that all of these different concerns are com-

(1) [1944] Sc.L.T. 41.
(2) [1945] 1 All E.R. 674; 27 Tax Cases 315.
(3) (1889) 2 Tax Cases 516, 528, 531.

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"panies which, having purchased or acquired land, "remain in the occupation of that land themselves, "and are using it for the purpose of some trade or "business whereby they acquire profits." In that case Lord McLaren points out that the question as to whether the Company should be assessed under rule 3 or under Schedule D. was of no pecuniary consequence, the assessable income being the same in either case, and the substantial issue was whether it was to be allowed to deduct part of the proceeds of the sale of plots as a realization or conversion of capital. The question as to whether the Company was liable to be assessed under Schedule A., No. III, rule 3, was not therefore argued, and though by the decision of the Scottish Courts the case was brought within that rule. I do not think we are bound to follow it in the present case in which the question is a substantial issue. I respectfully agree with du Parcq L.J. when he says: "I am by no means satisfied that the *Edinburgh* "*Southern Cemetery Co. v. Kinmont* (1) was rightly "decided."

In my opinion the attempt made by the Revenue to establish that rule 3 constitutes a genus or a net which covers all profits made out of lands which are, as counsel maintained, derived from some special form of user, fails, and to bring the case within the rule it must be shown that not only is there a concern having profits from or arising out of lands but that the concern must be of the like nature with some one or more of those enumerated in some respect other than that it produces profits by some form of special user.

Counsel for the Revenue argued that the fact that the House of Lords remitted the case to the Special Commissioners for rehearing involves a finding that if there be a concern it is a concern of the like nature, because if it is not a concern of the like nature there would have been judgment for the respondent.

This appears to me to be an untenable suggestion. The Lord Chancellor in moving the House refrained from deciding any of the questions to be raised and expressly left them all open. Further the division of

(1) (1889) 2 Tax Cases 516.

the issue into the two questions argued is, perhaps, convenient when considering whether there is a concern of any nature or not, but having found a concern, this division cannot be maintained when considering whether it is of the like nature since the concern and its nature must be examined together.

I cannot find any concern among the heterogeneous concerns mentioned in rule 3 which can be said to be of the like nature with the sand-pit in this case. It is more like some of the entities named in rules 1 and 2, under which, if named, it would have been taxable whether it be a concern or not. As it is not mentioned in these rules it can only be taxable if it be a concern of the like nature with those mentioned in rule 3, and in my opinion the Revenue have failed to establish this. I agree that the assessments must be discharged.

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The question therefore is: Was the sand-pit of the respondent a concern of the like nature with the other concerns mentioned in rule 3 having profits arising out of lands? In order to determine the answer it is necessary to refer to the relevant parts of Schedule A.

Tax under Schedule A. is chargeable in respect of the property in all lands, tenements, hereditaments, and heritages, in the United Kingdom for every twenty shillings on the annual value thereof, and the annual value is determined in accordance with the rules laid down in the Schedule.

No. I is the general rule for estimating the annual value of all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature and for whatever purpose occupied or enjoyed (except the properties mentioned in No. II and No. III of the Schedule), and it is provided that the annual value in such cases shall be understood to be the rackrent, if the premises are let at a rackrent, and if they are not let at a rackrent, then the rackrent at which they are worth to be let by the year.

In view of the construction which counsel for the Crown asked us to place upon the somewhat restricted general words of No. III, rule 3, it should be observed

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that excepting the properties specially mentioned, the language used in No. I is intended to cover the widest possible range of lands, tenements, hereditaments, or heritages, whatever be their nature or the purpose for which they are occupied or enjoyed.

Under section 187 of the Income Tax Act, 1918, in Ireland the poor law valuation instead of the rackrent is to be taken as the annual value for the purposes of Schedules A. and B., but if the judicial rent or the annual interest payable in lieu of rent or the purchase annuity is less than the poor law valuation, then for the purposes of Schedule B. the judicial rent or the annual interest in lieu of rent or the purchase annuity shall be taken to be the annual value.

No. II of the Schedule contains a number of rules for estimating the annual value of tithes, dues and money payments in right of the church, or by endowment, and other rights of property, which are not relevant to the present case.

No. III is as follows :—

"*Rules for estimating the annual value of certain "other Lands Tenements Hereditaments or Heritages "which are not to be charged according to the preceding "General Rule.*

"1. In the case of quarries, of stone, slate, lime- "stone, or chalk, the annual value shall be under- "stood to be the profits of the preceding year.

"2. In the case of mines of coal, tin, lead, copper, "mundic, iron, and other mines, the annual value "shall be understood to be the average amount of "one year of the profits of the five preceding years :

"Provided that &c., &c.

"3. In the case of ironworks, gasworks, salt "springs or works, alum mines or works, water- "works, streams of water, canals, inland navigations, "docks, drains or levels, fishings, rights of markets "and fairs, tolls, railways and other ways, bridges, "ferries, and other concerns of the like nature having "profits from or arising out of any lands, tenements, "hereditaments, or heritages, the annual value shall "be understood to be the profits of the preceding "year.

"4. Tax under the above rules shall be assessed "and charged on the person or body of persons "carrying on the concern, or on the agents or other "officers who have the direction or management of "the concern or receive the profits thereof."

By section 28 of the Finance Act, 1926, all the above mentioned concerns ceased to be chargeable under Schedule A., and it was provided that they should become chargeable under Schedule D., Case I, and that rules 4, 5, and 7 of Schedule A. should apply, and be deemed to be rules of Schedule D., Case I, for the purpose of charging those concerns.

Rules 1, 2 and 3 reproduce with slight alterations similar rules of the Income Tax Act, 1842, section 60, Schedule A., No. III, one of these alterations being the introduction of the words "having profits" into rule 3. The attribute of "having profits from or arising out "of any lands, tenements, hereditaments, or heritages," is common to the quarries and the mines mentioned in rules 1 and 2 as well as to the concerns mentioned in rule 3, and I can see no reason why these words should have been used in rule 3 any more than in rules 1 and 2. Nor can I see any reason why the quarries in rule 1 should be mentioned separately from the concerns in rule 3, since the annual value of the quarries and the concerns is declared to be the profits of the preceding year. The explanation of these and other anomalies appears to be that the Income Tax Act, 1918, was merely a consolidation Act. In *Great Western Railway Co. v. Bater* (1), Lord Wrenbury, who was a member of the Joint Committee in charge of the Bill, said: "The Committee had only to consolidate, and could "not substitute plain words to express a plain meaning "without going beyond the limits of consolidation. "The Act of 1918 therefore reproduces the old language "with all its faults, and has done little more than "improve matters a little by some re-arrangement. "If Parliament had the time, which it has not, the law "of income tax which now so vitally affects the "subjects of the realm ought as speedily as possible "to be expressed in a new statute, which should bear

(1) [1922] 2 A.C. 1, 31.

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"and express an intelligible meaning."

Counsel for the Crown sought to lay particular stress on the words in rule 3 "having profits from or arising "out of lands" which he said indicated an abnormal and non-natural user of the land, a user not for agriculture or forestry or a site for buildings.

In my opinion the words in this rule have exactly the same meaning as elsewhere in the Income Tax Acts. The Act of 1803, in which Schedules A. to E. appear for the first time, after the imposition of a duty upon lands, manors, and messuages, goes on to mention the various properties subject to the duty, adding the general words "and all other profits arising out of "lands and tenements."

The argument for the Crown on this branch of the case was based on an alleged distinction between the charge imposed under the General Rule, Schedule A., upon lands, tenements, hereditaments, or heritages, and the charge imposed upon profits from or arising out of lands, tenements, hereditaments, or heritages, under Schedule A., No. III. The same argument was rejected by the House of Lords in *London County Council v. Attorney-General* (1). It was there laid down that there was no difference in kind between the duties assessed under Schedule D. and those assessed under Schedule A. or any of the other schedules of charge. "In every case," Lord Macnaghten said, "the tax is a tax on income, whatever may be the "standard by which the income is measured. It is a "tax on 'profits or gains' in the case of duties charge- "able under Schedule A. and everything coming under "that Schedule, just as much as it is in the case of the "other schedules of charge" (2). So also Lord Davey: "I am, therefore, of opinion that the words 'profits or "'gains' are apt words, and the words chosen by the "Legislature for describing not only the taxable "subjects under Schedule D., but also those comprised "in Schedules A. and B. and the other schedules" (3).

I come now to the question whether this sand-pit is a "concern of the like nature" with the other concerns mentioned in rule 3. The difficulty of applying these

(1) [1901] A.C. 26. (2) Ibid. 36. (3) Ibid. 45.

words to the heterogeneous catalogue of concerns mentioned in the rule has been discussed at length in the judgments already delivered in this court, and also by the English Court of Appeal in *Mosley v. George Wimpey & Co. Ltd.* (1). The catalogue comprises three entirely different classes of "concerns," viz.: industrial works, public undertakings, and franchises such as tolls, markets, fairs, bridges, and ferries. It seems rather fantastic to suggest that this sand-pit in which sand was merely excavated and removed is of a like nature with salt springs or works, or alum mines or works, both of which are clearly industrial works involving the extensive use of power and machinery in mining, pumping and manufacturing operations. That the sand which constitutes portion of the agricutlural holding of the respondent is not a mineral is clearly shown by the decision of the Irish Court of Appeal in *Staples v. Young* (2). Nor is the sand-pit in itself a concern, though it might perhaps, if worked as an industrial undertaking, be deemed to be a "concern" in the hands of the person or persons who worked it. By No. III, rule 4, the assessment is to be made upon the person or persons who carry on the concern, that is to say, upon the person or persons who are engaged in the actual working of the concern, and not upon the person who receives payment for the privilege of permitting a lessee or a licensee to work the concern, so that even if this sand-pit were deemed to be a concern within the meaning of rule 3, an assessment could not be made at any rate under rule 4 upon the respondent, who as the Commissioners have found, neither excavated nor removed any sand.

In *Mosley's Case* (1) the English Court of Appeal held that the gravel pit undertaking carried on by the defendant Company under a licence from the plaintiff was a concern of the like nature with the concerns mentioned in rule 3. The Crown relied very strongly upon this decision, and particularly upon the opinion of Scott L.J., that the generic words of the rule ought to receive a wide interpretation, as disclosing an

(1) [1945] 1 All E.R. 674; 27 Tax Cases 315.
(2) [1908] 1 I.R. 135.

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express intention of Parliament to sweep into the net every concern of a general character of which the rackrent was an impracticable measure of annual value. Such a sweeping interpretation of the words of a taxing Act found little favour with du Parcq L.J., who described the rule as amorphous and perplexing, but thought with some doubt that the gravel-pit might be of a like nature with salt works or alum mines. The decision in the case and the construction placed upon the words of the rule "other concerns of the like "nature" are alike unsatisfactory, and the true construction of these words must remain in doubt until finally settled by a decision of the House of Lords or by further legislation.

Counsel for the respondent relied upon *Edmonds v. Eastwood* (1), which was decided by a very strong court (consisting of Pollock C.B., Martin, Watson and Channell BB.). The brickfield in that case was held on lease subject to a surface rent of £17 per annum and certain royalties or brick rents, and the lessee, having discharged the Income Tax on the royalties and brick rents, paid the balance to the lessor, who claimed that he was entitled to the entire amount of the royalties and brick rents on the ground that the brickfield was a concern of the like nature with the other concerns mentioned in rule 3, and that he was liable only for tax on the surface rent of £17. The lessor failed in his claim. The judgments contain some interesting criticism of the rule, each member of the court expressing doubt whether the brickfield was within the general words. Pollock C.B. and Martin B. had considerable doubt, while Watson B. referring to ironworks, gasworks, and the other concerns, said that the digging of clay and making it into bricks was a very different matter. Such being their opinion about a brickfield, which was unquestionably a manufacturing concern, I think that the case was rightly relied on by the respondent as shewing that a sand-pit, where the digging and removal of sand were the only operations, and where those operations were not carried on by the person whom the Crown seeks to assess and charge, is

(1) (1858) 2 H. & N. 811.

not a concern of the like nature with the concerns enumerated in rule 3.

Edinburgh Southern Cemetery Co. v. Kinmont (1) was the case of a commercial company which was formed for the purpose of selling grave plots in a cemetery. The judgments in this case have been so fully discussed by my colleagues that it is unnecessary for me to add anything except that it is a "startling proposition"—to use the words of the late Lord Justice Murphy—that this Edinburgh Cemetery is a concern of the like nature with the other concerns enumerated in rule 3. In *Fry v. Salisbury House Estate Ltd* (2), both Viscount Dunedin and Lord Macmillan refer to this cemetery case, but the only portion of the judgments which they quote is that portion of Lord McLaren's judgment which opens with words, which are peculiarly applicable to the respondent's case, as follows :—"It is certainly "not sufficient to bring a particular use of land within "the scope of rule 3 that the proprietor of the land is "using it in connection with his trade or for purposes "of trade."

The Special Commissioners in finding that there were sales of sand by the respondent and that these sales were by way of trade appear to have overlooked the legal effect of the agreements made with the various contractors. What was granted to each contractor was a profit a prendre, a right to dig and carry away sand from the sand-pit in consideration of a payment at the rate of sixpence, ninepence or one shilling a ton according to the quality of the sand.

A similar question arose in *Stratford v. Mole & Lea* (3). A firm of sand and gravel merchants had purchased all the sand and gravel upon a certain parcel of land, paying therefor a fixed sum per ton for all sand and gravel removed. The contention of the firm was that the agreement was a sale of goods, but the Special Commissioners found that the payments made by the firm were a rent within the meaning of section 21 of the Finance Act, 1934, and Lawrence J., following the decisions in *Morgan v. Russell & Sons* (4), and *Lavery v.*

(1) (1889) 2 Tax Cases 516.
(2) [1930] A.C. 432, 445, 469.
(3) (1941) 24 Tax Cases 20.
(4) [1909] 1 K.B. 357.

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Pursell (1), held that the agreement was not an agreement for the sale of goods, but that it created a profit a prendre and an interest in land.

It is true that the firm in that case had an agreement in writing for the removal of sand and gravel for a period of three years, but with regard to the manner in which the proprietor dealt with his land, there is no essential difference between that case and the present one.

In *Ormond Investment Co. v. Betts* at (2), Lord Atkinson clearly stated the principles which should guide us in the interpretation of Acts which impose a tax upon the subject. "It is well established," he says, "that one is bound, in construing Revenue Acts, "to give a fair and reasonable construction to their "language without leaning to one side or the other, "that no tax can be imposed on a subject by an Act "of Parliament without words in it clearly showing "an intention to lay the burden upon him, that the "words of the Statute must be adhered to and that "so-called equitable constructions of them are not "permissible."

Applying these principles to the present case, I hold that the Crown has not proved that the respondent was carrying on a concern of the like nature with the concerns enumerated in rule 3, and if the sand-pit is not covered by the rule when fairly construed according to the natural meaning of the words, that can only be remedied by legislation and not by an attempt to construe the rule benevolently in favour of the Crown: (*Attorney-General v. Selborne* (3), per Collins M.R.).

I agree that this appeal should be dismissed with costs.

The Crown appealed to the House of Lords (4).

(1) (1888) 39 Ch. D. 508.
(2) [1928] A.C. 162.
(3) [1902] 1 K.B. 388, 396.

(4) Present: Viscount Simon, Lord Porter, Lord Simonds, Lord Normand and Lord Oaksey. The report of the speeches in the House of Lords is printed from the short-hand notes of Messrs. W. B. Gurney, Sons and Funnell.

Curran A.-G., *Topping K.C.* (both of the Bar of Northern Ireland), *R. P. Hills* (of the English Bar) and *Harrison* (of the Bar of Northern Ireland) for the Crown.

Cyril King K.C. (of the English Bar), *McCoy K.C.* and *McVeigh* (of the Bar of Northern Ireland) for the respondent.

The House took time for consideration.

VISCOUNT SIMON: My Lords, The question in this appeal is raised by a case stated by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice in Northern Ireland.

The respondent is the owner in fee simple of a farm of some twenty-five acres in the County of Londonderry. It was discovered that, under a portion of the surface of this farm extending to about one acre, sand existed in considerable depth and the respondent allowed various persons to come on his land, dig sand, and take it away, with the result that a sand-pit was formed which was regularly and continuously worked from January, 1941, until about October, 1944, by which time the pit was practically exhausted. The sand was of different qualities and the respondent's charges varied from between sixpence to one shilling per ton according to the quality of the sand gotten. The hours of working at the pit were from 8 a.m. to 6 p.m. daily. A road to the sand-pit from the county road was, with the respondent's approval, made by a Mr. Moore, who was the earliest and biggest contractor. The demand for this sand principally arose in connection with the construction of aerodromes in Northern Ireland. The sand was excavated by the various contractors' men by shovelling, and was loaded into lorries for removal. The respondent employed a man to record the tonnage of sand taken in each case, and this employee supervised the pit generally and directed the various contractors to the particular part of the face of the pit where each should work. There was a regular system for rendering accounts, for checking them and for receiving payments.

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The profits made by the respondent from the disposal of sand from this sand-pit amounted to £150 in 1940-41, £1,250 in 1941-42, and £3,750 in 1942-43.

The Revenue contends that the respondent, in connection with this sand-pit, was carrying on a "concern "of the like nature" within the meaning of those words in No. III, rule 3, of the rules applicable to Schedule A. If so, income tax would be separately charged by reference to the profits made by him in the preceding year. The respondent, on the other hand, argues that what he was doing in connection with this sand-pit did not amount to the carrying on of a "concern" at all, and that even if it did, it was not a "concern of the "like nature" within the meaning of rule 3. If this contention prevails, income tax would be charged on the annual value of the farm as a whole, calculated as directed for Ireland by section 187 of the Income Tax Act, 1918.

The Commissioners decided against the respondent on both points, but stated a case which admirably sets out the facts found by them, and formulates their decision thus :—

> "We find that the sales of sand by the appellant" (the present respondent) "which amounted to more "than 100,000 tons and extended over three years, "were by way of trade, that they were not merely "casual and occasional but constituted a series of "transactions carried out in pursuance of a regular "method and we arrive at the conclusion that the "sand-pit was a concern carried on by the appellant. "Further, following the decision in the Court of "Appeal in *Mosley v. George Wimpey & Co. Ltd.* (1), "we hold that it was a concern of a like nature with "those enumerated in rule 3 of No. III of Schedule A. "We accordingly confirm the assessments appealed "against in principle and leave the figures to be "agreed between the parties."

When the matter came on appeal before Black J., that learned judge considered himself to be bound by the views expressed in an earlier stage of the same

(1) [1945] 1 All E.R. 674; 27 Tax Cases 315.

controversy by the Court of Appeal in Northern Ireland, and consequently reversed the view of the Commissioners.

In the Court of Appeal the Lord Chief Justice confirmed the Commissioners' view that the respondent was conducting a "concern," but rejected the Commissioners' other conclusion that it was a "concern of "the like nature." Babington L.J. considered the Revenue's contention to be wrong on both points, saying as regards the first that he could find no evidence to justify the finding of the Commissioners that the respondent carried on any "concern" or did anything more than convert his sand into money. Porter L.J. agreed with the view that there was no "concern of "the like nature" being carried on by the respondent, and thus the Court of Appeal was unanimous in holding that the Revenue's claim failed. From this decision an appeal is now brought to this House.

In order to reach a correct conclusion in this difficult matter it is necessary to examine the language of parts of Schedule A. with much care. It is first to be observed that No. I is the General Rule to which No. III, like No. II, is an exception. There is nothing therefore in the scheme of the Schedule to require that No. III should be given a wider interpretation than its terms on their natural construction require. All that will happen when tax under Schedule A. is charged "in "respect of the property in all lands, tenements, "hereditaments, and heritages in the United Kingdom" is that, if the case does not fall within either of the rules which constitute exceptions, it will fall under the general rule No. I and the tax will be calculated on annual value as therein defined.

No. III is headed, "Rules for estimating the annual "value of certain other Lands, Tenements, Heredita-"ments, or Heritages which are not to be charged "according to the preceding General Rule" and provides as follows :—

"1. In the case of quarries of stone, slate, lime-"stone, or chalk, the annual value shall be under-"stood to be the profits of the preceding year

"2. In the case of mines of coal, tin, lead, copper,

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"mundic, iron, and other mines, the annual value "shall be understood to be the average amount for "one year of the profits of the five preceding years :

"3. In the case of ironworks, gasworks, salt "springs or works, alum mines or works, waterworks, "streams of water, canals, inland navigations, "docks, drains or levels, fishings, rights of markets "and fairs, tolls, railways and other ways, bridges, "ferries, and other concerns of the like nature "having profits from or arising out of any lands, "tenements, hereditaments or heritages, the annual "value shall be understood to be the profits of the "preceding year.

"4. Tax under the above rules shall be assessed "and charged on the person or body of persons "carrying on the concern, or on the agents or other "officers who have the direction or management of "the concern or receive the profits thereof."

Section 28 of the Finance Act, 1926, transferred the calculation of tax in respect of properties included in No. III to Case I of Schedule D., and consequently the measure is now the profits of the preceding year in rule 2 as well as in rules 1 and 3.

I agree with Andrews L.C.J. that what the respondent was doing in connection with his sand-pit amounted to the carrying on of a "concern." The question is not, of course, (as the language of the Commissioners, if strictly read, might seem to imply), whether the sand-pit was itself, a "concern" but whether the respondent's activities in connection with it amounted to the carrying on of a "concern," and this, I think, is what the Commissioners really meant by their finding. "Concern" is a very wide word, and appears to imply an adequate degree of business organisation for the purpose of carrying on the undertaking. But the amount of organisation needed must depend upon the character of the "concern" itself. It will be noted from the language of rule 4 that all the various enterprises in rules 1, 2 and 3 are spoken of as "concerns" and it is obvious that the amount of organisation needed for a toll or for streams of water would be vastly less than for a mine of coal or for gasworks. The

language of rule 4 implies that, in order to amount to a "concern," there must be direction or management as well as the receipt of profits. Here the facts found by the Commissioners show that there was a regular system of direction and management sufficient for the exploiting of the sand-pit by its owner, and the Commissioners had material before them on which they could properly arrive at the conclusion of fact that the respondent was carrying on a "concern." Such a conclusion must be accepted unless there were no facts to support it, and in my opinion the conclusion can be supported by the material in the case. I should myself draw the same conclusion.

All this, however, will not assist the appellant unless the conclusion is also reached that the "concern" was "a concern of the like nature" within the meaning of rule 3. In view of the heterogeneous list of specific undertakings which precedes this phrase, it is a matter of the greatest difficulty to determine whether the phrase can properly include a sand-pit. Indeed, if a collection of items is heterogeneous, it almost seems a conflict in words to say that they belong to the same genus. But there the words are in the statute, and, if possible, the phrase must be given some meaning.

The arguments before the House have sought an interpretation by pursuing two alternative methods. One method is to search for some common feature in the specific items regarded as a single collection. The other method is to treat the phrase as though it ran, "other concerns of the like nature to any one of the "above."

The two contrasted methods are illustrated in the judgments of Scott L.J. and du Parcq L.J. in *Mosley v. George Wimpey & Co. Ltd.* (1), where the Court of Appeal held that the undertaking of working a gravel-pit by a Company which had acquired the exclusive right to do so fell within the words now under examination. In that case Scott L.J. took the view that the list of specific undertakings in rule 3 constituted a single genus because they all involve a special or intensive use of

(1) [1945] 1 All E.R. 674 ; 27 Tax Cases 315.

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the land with a view to its exploitation for commercial profit as distinguished from what he regarded as the ordinary use of land for agricultural purposes (including forestry) or for the site of buildings and the like. Du Parcq L.J., on the other hand, was prepared to hold that a gravel-pit could be regarded as analagous to certain items in the list, viz., "salt works" or "alum works," as these are instances in which profits are made by commercially dealing with mineral deposits on or under the land.

The phrase "other concerns of the like nature" following a whole list of concerns which, with some more recent additions, constituted the specific subject matters of what is now rule 3 of No. III first appears in the Income Tax Act of 1806 (46 Geo. 3, c. 65, s. 74). "Gasworks" and "Railways" were added to the list by the Act of 1842 (5 & 6 Vict., c. 35). Mr. Cyril King, in resisting the contention that a sand-pit could be included as *ejusdem generis* with what went before pointed out that in nearly all of the specific cases in rule 3, the ground itself is substantially preserved while the concern is being carried on, and there is no abstraction of the land but only a special use of it, whereas in rules 1 and 2 the profit was made by abstraction of a wasting asset. Hence, he argued, a concern which involves the abstraction and ultimate exhaustion of sand or gravel could not be within rule 3. Moreover, as such concerns as these were neither any of the quarries specified in rule 1 nor mines dealt with in rule 2, it followed that the tax under Schedule A. of the concern of carrying on a sand-pit did not depend on profits, but fell within the general rule No. 1.

One difficulty in the way of this argument is that an alum mine would apparently involve substantial extraction. Moreover, this view of the matter would not only involve dissent from the Court of Appeal's decision in *Mosley v. George Wimpey & Co. Ltd.* (1) above referred to, but also would be inconsistent with views expressed as to the scope of rule 3 in *Edinburgh Southern Cemetery Co. v. Kinmont* (2).

(1) [1945] 1 All E.R. 674; 27 Tax Cases 315.

(2) (1889) 2 Tax Cases 516.

This last case deserves careful consideration in connection with the present matter, but it is not necessary in this Appeal to reach a conclusion as to whether it is correctly decided or not.

The Crown's intention in the present case involves the drawing of a distinction between the "ordinary" and the "extraordinary" use of land, and by the latter is meant some intensive exploitation of the surface or subsoil by means of which a profit is derived which is likely to vary from year to year, as distinguished from the "normal" user of land, of which its use for agriculture or forestry or for the site of buildings are regarded as examples. In the latter case the assessment is by reference to annual value as defined in rule I and such annual value is not likely to vary each year. On this view of the matter No. III applies where the land is specially exploited as distinguished from being normally used. It is suggested that such a contrast, though difficult to work out exactly, corresponds with the common sense of the matter and with the general scheme of income tax, for although the owner of land thus specially exploited was originally dealt with under Schedule A. because his income was primarily derived from his property either in or under the land, it was still desirable to draw a distinction between the proprietor who made a valuable profit by extraordinary use and the proprietor in whose case the use to which the land was put was "normal."

Whatever view may be taken of this contention, it does not, to my mind, decide the present issue in favour of the Revenue. The difficulty of classifying the exploitation of sand-pits, or gravel-pits, as extraordinary or abnormal uses of land still persists. The digging and carrying away of sand or of gravel have been, I apprehend, one of the normal uses of suitable areas of land from the earliest times. The very fact that a concern depending on a sand-pit requires so little organisation makes me doubt whether an enterprise of this sort can properly be thrown into the "extraordinary" class. If, in the contemplation of the legislature, the exploitation of sand-pits or gravel-

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pits was an example of the special cases included in rule 3 of No. III, it is difficult to imagine why the rule did not specifically mention so obvious and so common an example. The same consideration applies to clay for making bricks, and in *Edmonds v. Eastwood* (1), a very strong Court of Exchequer held that a brickfield was not within No. III. Pollock C.B., Watson B., Channell B. and Martin B., all took the view that the getting of such material from land would not bring into play the special rule. It does not appear that this decision was brought to the attention of the Court of Appeal in *Mosley v. George Wimpey & Co. Ltd.* (2), nor is there any reference to it in the judgments delivered in that case. It is possible that it may have been overlooked because *Edmonds v. Eastwood* (1) is not a Revenue case, but the importance of what the Court of Exchequer then laid down cannot be minimised.

My conclusion therefore is that the concern of working a sand-pit, such as is found to exist in this case, does not fall within the concerns covered by rule 3 of No. III, and that the whole farm ought, as the Court of Appeal in Ireland held, to be assessed under the General Rule. This conclusion involves the overruling of the *ratio decidendi* of *Mosley v. George Wimpey & Co. Ltd.* (2). We were informed that concerns for working china-clay have been customarily assessed under rule 3 of No. III and, in view of the much greater elaboration of that process which involves operations akin to mining (see the account given in *Hext v. Gill* (3)) the present decision does not necessarily affect that practice.

I must add that the language of the rule is so obscure and so difficult to expound with confidence that—without seeking to apply any different principle of construction to a Revenue Act than would be proper in the case of legislation of a different kind—I feel that the taxpayer is entitled to demand that his liability to a higher charge should be made out with

(1) (1858) 2 H. & N. 811.
(2) [1945] 1 All E.R. 674; 27 Tax Cases 315.
(3) (1869) L.R. 7 Ch. 699, 703.

reasonable clearness before he is adversely affected. In the present instance, this reasonable clearness is wanting.

I move that this appeal be dismissed with costs.

LORD PORTER: My Lords, I concur.

LORD SIMONDS: My Lords, the relevant facts of this case have been so fully stated that I need not repeat them nor should I think it necessary to add anything upon the general questions of law that arise but for the importance of the case and the fact that it is necessary to consider and in effect overrule the decision of the Court of Appeal in England in *Mosley v. George Wimpey & Co. Ltd.* (1).

The two questions of law, which are in truth two branches of one question, are (1) whether that which the respondent did in relation to a sand-pit forming part of his farm at Glebe in the County of Londonderry was the carrying on of a "concern" and (2) if so, whether it was a "concern of the like nature having "profits from or arising out of any lands" within the meaning of rule 3 of No. III of Schedule A. to the Income Tax Act, 1918.

Upon the first question I will add nothing to what has been said by my noble and learned friend on the woolsack. It is upon the second question that I wish to make some observations.

My Lords, there is a maxim of income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. It is necessary that this maxim should on occasion be re-asserted and this is such an occasion. Here it is sought to tax the owner and occupier of land in respect of the profits made by him from the sale of sand upon the footing that in effecting those sales he is carrying on a concern which is of the like nature to "ironworks, gasworks, "salt springs or works, alum mines or works, water-

(1) [1945] 1 All E.R. 674; 27 Tax Cases 315.

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"works, streams of water, canals, inland navigations, "docks, drains or levels, fishings, rights of markets "and fairs, tolls, railways and other ways, bridges and "ferries." I need go no further into the history of this catalogue than to say that with some additions it goes back for nearly 150 years. During the whole of that time there can have been no more familiar feature of the landscape than pits of sand or gravel or clay and I cannot doubt that during that time and before it the owners of such pits have been accustomed in greater or less degree to exploit them not only for their own use but by profitable sales. Yet it is suggested that the Legislature, while expressly including in the catalogue such comparatively rare concerns as alum mines or works and salt springs or works, yet left to the precarious embrace of the expression "other concerns of "the like nature" the commonplace operations which it is now sought to tax. Nor does the matter rest there. For the catalogue which I have recited follows immediately after rule 1, which deals with quarries of stone, slate, limestone, or chalk, and rule 2, which deals with mines of coal, tin, lead, copper, mundic, iron, and other mines. Here surely would be the appropriate setting in which, had the Legislature so intended, pits of sand or gravel or clay should *eo nomine* have been placed or included by words of general description. I cannot bring myself to suppose that the Legislature either overlooked what almost obtrudes itself on the eye of any observer, or, observing it, deliberately refrained either from mentioning it or from putting it in its proper place.

I am brought back then to the maxim that I have mentioned. For it appears to me that here is a case in which the subject is entitled to say that the words of the section under which it is sought to tax him do not do so with the clarity which the subject matter demands.

What I have said applies equally to gravel-pits and to sand-pits and it follows that in my view *Mosley's Case* (1) was wrongly decided. The argument of the

(1) [1945] 1 All E.R. 674; 27 Tax Cases 315.

learned Attorney-General was properly founded on that decision. I must therefore observe on it that, while Scott L.J. rested his judgment on the view that "the generic words should . . . be interpreted widely, "and as disclosing an express intention of Parliament "to sweep into the net every concern of the general "character I have endeavoured to describe above," du Parcq L.J. disclaimed this view and found in a sand-pit a concern of a like nature to two of the particular concerns included in the catalogue, viz. : salt works and alum mines. Your Lordships have not the advantage of knowing the opinion of Uthwatt J. upon this point.

My Lords, I agree with du Parcq L.J. in thinking that the general proposition of Scott L.J. cannot be sustained. In the first place I think with great respect that he ignores that No. III in Schedule A. comprises exceptions to the general rule which is to be found in No. I. What is not covered by the language of No. III falls within No. I if it is within Schedule A. at all and does not fall within the other exceptions, and there is no need to give to No. III a wider meaning than, construed as a taxing statute, it strictly requires. Secondly I cannot accept what I understand to be the view of Scott L.J. as to the generic conception of the specified concerns, viz., that they have the common feature of a variable economic yield which makes the rackrent an untrue or impracticable measure of annual value and a dissimilarity to the "normal" use of land. It is not, I think, open to the House after the decision in *Fry v. Salisbury House Estate Ltd.* (1), to say that if a "concern" satisfies these two conditions it must necessarily fall within rule 3 of No. III. Nor, apart from that decision, should I be prepared to accept such a proposition. For, if these two conditions constituted the difference between the cases falling within No. I and No. III, I see no necessity for segregating the items in rule 1 from those in rule 3 nor indeed for any catalogue at all.

Nor, my Lords, can I accept the view expressed by du Parcq L.J. that a gravel-pit is a concern of like

(1) [1930] A.C. 432.

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nature to alum mines or salt springs and therefore within rule 3. I would doubt whether, where a list is followed by such general words as "concerns of like "nature," it is proper to regard as covered by those words concerns which have a likeness to one or two of the items but do not exhibit a characteristic common to them all. But, however this may be, I cannot find a sufficient likeness to the items chosen by du Parcq L.J. to justify the inclusion of concerns which, if they had been intended to be included, would surely themselves have been selected as examples. In this connection I refer to my earlier observations and reinforce them by reference to the case of *Edmonds v. Eastwood* (1), which appears not to have been called to the attention of the Court of Appeal in *Mosley's Case* (2). In that case, which was decided 90 years ago and has never so far as I am aware been criticised, Pollock C.B. used these words: "I entertain considerable doubt— "indeed more than a doubt—whether brickfields are "to be treated as coal mines or salt works, or any of "those matters specifically mentioned in the rules to "Schedule A. No. III . . . With the public notoriety "that property of that description exists to a great "extent, especially in the neighbourhood of London, "it seems almost impossible, if it was intended to "include it, that it should not have been inserted by "name in the same category as coal mines or salt "works"; and again: "My opinion is that the case "of a brickfield was not intended to be included "within No. III." In this view Watson B. expressly concurred. Martin B. observed that he concurred with the Lord Chief Baron that there was considerable doubt whether this was so— i.e., whether a brickfield fell within the third rule of No. III; he appears to have underestimated the force of the Lord Chief Baron's conviction. Channell B. doubted whether the case fell within No. I or No. III.

My Lords, I do not think that your Lordships would be justified in disregarding these expressions which have gone so long unchallenged upon the meaning and

(1) (1858) 2 H. & N. 811.

(2) [1945] 1 All E.R. 674; 27 Tax Cases 315.

effect of a taxing statute, even if they did not wholly commend themselves. But for myself there is in them not only the force of almost venerable authority but also compelling reason. I would dismiss this appeal accordingly.

I must finally say a few words about the so-called cemetery cases which begin with the *Edinburgh Southern Cemetery Co. v. Kinmont* (1). Your Lordships are not, I think, called on to review the correctness of these decisions. In the cited case Lord President Inglis without giving any further reason said that it appeared to him that the Cemetery company there under consideration "fell very fairly within the words 'other "' concerns of the like nature' as occurring in that "rule." Lord Shand said that the true solution of the question was to be found in the fact that "all of these "different concerns relate to companies which, having "purchased or acquired land, remain in the occupation "and use of that land themselves, and are using it for "the purpose of some trade or business whereby they "acquire profits." I do not think that the learned judge is here laying any stress on companies as distinguished from natural persons, but I would respectfully suggest that, if he meant that all companies or persons, which satisfy the test that he indicates, at once come within rule 3 of No. III, the proposition is far too wide. It may well be that, if the matter came to be argued before your Lordships, there would be found some common characteristic which would justify the inclusion of cemetery companies in the rule. Remembering the high authority of Lord President Inglis I am not disposed without argument to decide the contrary. But in this case I do not feel called upon either to attempt a definition of the class which rule 3 embraces or to do more than reject the contention of the Inland Revenue that they have established that a sand-pit is a "concern of like nature" to the concerns enumerated in rule 3 of No. III or to any one or more of them.

LORD NORMAND: My Lords, I concur in the two

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speeches which have been delivered by my noble and learned friends.

LORD OAKSEY : My Lords, I agree that the judgment of the Court of Appeal in Northern Ireland is right and should be affirmed.

The question is whether the respondent in the way in which he dealt with a sand-pit on his farm was carrying on a concern of the like nature with the concerns referred to in rule 3 of No. III of Schedule A.

I agree with your Lordships that there was evidence upon which the Commissioners could find that the respondent was carrying on a concern. The question remains whether it was a concern of a like nature to the other concerns mentioned in rule 3. On this question I agree with the observations of my noble friend Lord Simonds on the maxim of income tax law that the subject is not taxed unless the words of the taxing statute unambiguously impose the tax upon him.

It has been argued by the Attorney-General for Northern Ireland that No. III of Schedule A. should be construed to include all concerns connected with land which are in their nature commercial, and which produce varying profits, that the characteristic suggested by the respondent's counsel, namely, extraction of part of the soil, is inconsistent with the inclusion of salt springs and alum mines in rule 3 and further is unconnected with any reason for treating such concerns differently from any other concern connected with the land. It was also suggested that No. I dealt with the agricultural uses of land and No. III with all other uses.

I am unable to accept these arguments. I do not think the interpretation of such provisions as Schedule A., Nos. I and III, can be approached in this general way. It may be that it would have been perfectly reasonable to tax every profit arising from land, other than agricultural profit, in a different way from agricultural profit, but it is necessary to consider the words used and the frame of the Schedule.

Schedule A. provides by No. I :—

"*General Rule for estimating the annual value of*
"*Lands, Tenements, Hereditaments or Heritages.*

"In the case of all lands, tenements, heredita-
"ments or heritages capable of actual occupation,
"of whatever nature, and for whatever purpose
"occupied or enjoyed, and of whatever value (except
"the properties mentioned in No. II and No. III of
"this Schedule), the annual value shall be understood
"to be :—the amount of the rent," etc.

No. III is one of the exceptions and everything not dealt with in the exceptions must fall within the general provisions of No. I. No. I is not confined to agricultural uses of land, but refers to all uses except those in Nos. II and III.

No. III rule 1, I think, deals with quarries and rule 2 with mines exhaustively, with the single exception of alum mines, and it is conceded that sand-pits are not included in rules 1 or 2. Now the digging of sand, gravel, clay or peat are and have been from time immemorial ordinary and well-known uses of land, and it is in my view impossible to construe rule 3, which deals expressly with a variety of subjects, none of which bears anything like such a close resemblance to digging for sand as do the subjects dealt with expressly in rule 1, as including sand-pits merely because alum mines are included in rule 3.

The reason why such subjects as sand-pits were omitted from the list in No. III (though it is not for the courts to find a reason) was, I imagine, because the concern of using a sand-pit or the like was considered to be an ordinary use of land. In any event sand-pits are not expressly referred to in No. III and to bring them in under such words as "other concerns of the "like nature" in rule 3 appears to me to be an unjustifiable extension of general words in an exception. For my own part, I am not at present prepared to hold that it is necessary to find a category to which all the subjects enumerated in rule 3 belong, and that concerns of a like nature must fall within that category, but in my opinion digging sand is not of a like nature to any

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speeches which have been delivered by my noble and learned friends.

LORD OAKSEY : My Lords, I agree that the judgment of the Court of Appeal in Northern Ireland is right and should be affirmed.

The question is whether the respondent in the way in which he dealt with a sand-pit on his farm was carrying on a concern of the like nature with the concerns referred to in rule 3 of No. III of Schedule A.

I agree with your Lordships that there was evidence upon which the Commissioners could find that the respondent was carrying on a concern. The question remains whether it was a concern of a like nature to the other concerns mentioned in rule 3. On this question I agree with the observations of my noble friend Lord Simonds on the maxim of income tax law that the subject is not taxed unless the words of the taxing statute unambiguously impose the tax upon him.

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I am unable to accept these arguments. I do not think the interpretation of such provisions as Schedule A., Nos. I and III, can be approached in this general way. It may be that it would have been perfectly reasonable to tax every profit arising from land, other than agricultural profit, in a different way from agricultural profit, but it is necessary to consider the words used and the frame of the Schedule.

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No. III is one of the exceptions and everything not dealt with in the exceptions must fall within the general provisions of No. I. No. I is not confined to agricultural uses of land, but refers to all uses except those in Nos. II and III.

No. III rule 1, I think, deals with quarries and rule 2 with mines exhaustively, with the single exception of alum mines, and it is conceded that sand-pits are not included in rules 1 or 2. Now the digging of sand, gravel, clay or peat are and have been from time immemorial ordinary and well-known uses of land, and it is in my view impossible to construe rule 3, which deals expressly with a variety of subjects, none of which bears anything like such a close resemblance to digging for sand as do the subjects dealt with expressly in rule 1, as including sand-pits merely because alum mines are included in rule 3.

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of the enumerated subjects, having regard to the context of rules 1 and 2 in which rule 3 occurs.

Apart from these reasons of construction, I think it is not unimportant that as long ago as 1859 in the case of *Edmonds v. Eastwood* (1) Pollock C.B. and Martin and Watson BB. all expressed the view that No. III did not include digging for clay.

This case does not appear to have been cited to the Court of Appeal in England, in the case of *Wimpey v. Mosley* (2), where it was held that the extraction of gravel for commercial purposes was a concern within No. III. For the reasons which I have given, that case must in my opinion be over-ruled. I cannot agree with the view of Scott L.J. that the widest possible interpretation ought to be given to the exceptions contained in No. III, nor can I agree with du Parcq L.J. as he then was, in holding that digging of gravel is a concern of a like nature with alum mines.

Appeal dismissed.

Solicitor for the appellant : *Solicitor of Inland Revenue.*

Solicitor for the respondent : *Rising & Ravenscroft* for *W. J. G. Seeds, Belfast and Limavady.*

J. McC.

(1) (1858) 2 H. & N. 811.

(2) [1945] 1 All E.R. 674 ; 27 Tax Cases 315.

BRIGGS v. GIBSON'S BAKERY, LIMITED (1).

K.B.D. 1948.

April 27; May 14.

Motor car—Insurance—Limited company permitting servant to drive vehicle when uninsured—Motor Vehicles and Road Traffic Act (Northern Ireland), 1930 (20 & 21 Geo. 5, c. 24), s. 6—Whether limited company a "person"—Interpretation Act, 1889 (52 & 53 Vict., c. 63), ss. 2, 19.

Section 6 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, makes it unlawful for "any person" to use or permit the use of a motor vehicle on a public highway unless there is in force such insurance against third-party risks as complies with the requirements of that Act. By section 6 (2) of that Act if "a person" acts in contravention of the section he is liable to fine or imprisonment or to both, and "a person" so convicted shall be disqualified for holding or obtaining a driving licence.

Held, that a limited company which permitted its employee to use a motor vehicle on a public highway was "a person" within the meaning of the section and could accordingly be convicted of an offence thereunder.

The fact that the provisions of section 6 (2) relating to disqualification for holding or obtaining a driving licence are inappropriate to a body corporate which is not capable of holding or obtaining such licence does not constitute a contrary intention sufficient to displace the general rule contained in sections 2 and 19 of the Interpretation Act, 1889, under which "person" includes a body corporate.

CASE STATED by the resident magistrate sitting at Antrim Petty Sessions.

The respondent company, a limited company registered under the Companies Act, was charged at Antrim Petty Sessions under section 6 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, that they did permit one William McHenry to use a motor lorry on the public highway there not being in force in relation to the user such a policy of insurance or other security in respect of third-party risks as required by the said section. At the same court William McHenry was charged with using the vehicle when uninsured and was convicted on his own confession.

(1) In the King's Bench Division before Andrews L.C.J. and Lowry J.

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William McHenry was an employee of the respondent company, and by reason of his age he had a driving licence which entitled him to drive only a motor vehicle which did not exceed in weight 2 tons 10 cwts. At the time of the alleged offence he was driving in the course of his employment by the respondent company a vehicle which exceeded this weight, and as he was not a duly licensed driver the policy of insurance which had been effected in respect of the vehicle did not apply.

At the hearing of the case at Petty Sessions the only question before the court was whether a limited company was " a person " within the meaning of section 6 of the Act. The learned resident magistrate accepted the view that the provisions of section 6 (2), by which any " person " convicted of an offence under the section should automatically be disqualified for holding or obtaining a driving licence, being inapplicable to a body corporate, constituted a " contrary intention " within the meaning of section 2 of the Interpretation Act, 1889 ; and accordingly he dismissed the charge, but stated this case for the opinion of the High Court.

Nicholson K.C. and *Belford* for the appellant.

Patton K.C. and *J. A. Brown* for the respondent company.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J. : The issue involved in this case is a narrow one. The defendants were charged at Antrim Petty Sessions on the 11th February, 1948, with permitting one, William McHenry, to use a motor lorry on the public highway, there not being in force in relation to the user of the said lorry a policy of insurance or security in respect of third party risks, contrary to section 6 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930. McHenry, an employee of the defendants, who was charged with using the same vehicle on the said occasion when uninsured, admitted the offence, was convicted and fined, and was disqualified for holding or obtaining a driving licence for

twelve months under section 6 (2) of the said Act. The illegality relied upon by the complainant, who is a District Inspector in the Royal Ulster Constabulary, arose from the fact that McHenry, by reason of his age, had a driving licence which entitled him to drive only a motor vehicle which did not exceed in weight 2 tons 10 cwt. and the vehicle which he was driving did exceed this weight. As he was not a duly licensed driver the insurance which had been effected in respect of the vehicle did not apply, and consequently he was using the vehicle without any insurance or security in respect of third party risks being in force in regard to it. McHenry had been sent out on his journey by the defendants' responsible Works Manager.

The sole question in the case is whether the defendants —a limited company—are a "person" within section 6 of the said Act of 1930—a section which, for all material purposes, is identical with section 35 of the British Road Traffic Act, 1930, which became law a few months prior to the passing of the Northern Ireland Act. Section 6 (1) of the latter Act provides as follows :—

"Subject to the provisions of this Part of this "Act, it shall not be lawful for any person to use, "or cause or permit any other person to use, a motor "car on a public highway unless there is in force in "relation to the user of the motor car by that person "or that other person, as the case may be, such a "policy of insurance or such a security in respect of "third-party risks as complies with the requirements "of this Part of this Act."

This sub-section, having created the offence, is followed by sub-section (2) which imposes the penalty. It is in the following terms :—

"If a person acts in contravention of this section, "he shall be liable on summary conviction to a fine "not exceeding fifty pounds or to imprisonment for a "term not exceeding three months or to both such "fine and imprisonment, and a person convicted of "an offence under this section shall (unless the court "for special reasons think fit to order otherwise and "without prejudice to the power of the court to

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ANDREWS L.C.J.

"order a longer period of disqualification) be dis-
"qualified for holding or obtaining a licence under
"section three of the principal Act for a period of
"twelve months from the date of the conviction."

The opening words of section 6 (1)—"Subject to the "provisions of this Part of this Act"—refer to section 19, which contains an exemption in favour of the Crown, and also to section 6 (4) which provides that the section shall not apply to a motor car owned by the Council of a County or County Borough, the Belfast Harbour Commissioners or the Belfast City and District Water Commissioners, or by a person who has made such a deposit with the Accountant General of the Supreme Court of Northern Ireland as is therein mentioned.

No definition of the word "person" is contained in section 6 or in any other part of the Northern Ireland Act of 1930; and we are, accordingly, obliged to turn for its meaning to sections 2 and 19 of the Interpretation Act, 1889, under which the word "person" shall, "unless the contrary intention appears," include a body corporate (section 2) or any body of persons corporate or incorporate (section 19). The question which we, therefore, have to answer is whether such "contrary intention" appears in section 6 of the said Act of 1930. Does it appear that it was the intention of Parliament that limited companies or other bodies of persons, whether corporate or incorporate, or merely partners, should enjoy an immunity in regard to third-party insurance which is denied to the individual owner of a motor car? On general principles, and with due regard to the underlying policy of this part of the Act, one's answer would naturally be in the negative. This view is in my opinion supported by section 6 (1)—the section which creates the offence—which does not contain a single word restrictive of the meaning of "person" to an individual. I would here add that this view is accepted without reservation by the learned author of Shawcross on the Law of Motor Insurance, who, dealing with the corresponding sub-section (1) of section 35 of the British Statute, says with a reference to the Interpretation Act:—"Save

"where the context necessarily involves otherwise, "the expression 'person' includes a firm or company. "Thus such persons as firms or companies may be "prosecuted for non-compliance with this or other "provisions of the Act." The same opinion, is repeated in the notes to sub-section (2) of section 35—the sub-section which creates the penalty for the offence. This view, in my opinion, derives further support from the list of excluded persons mentioned in sub-section (4) already referred to, none of whom need have been excepted if the word "person" in sub-section (1) was intended only to refer to an individual owner. If it be admitted, as was contended by Mr. Patton on behalf of the defendants, that the form of sub-section (4) excludes motor cars not persons, it may be said in reply that, from the practical standpoint, the sub-section confers the benefit of the exception upon persons using and owning such motors, as it is only when they are in use that it is necessary to be covered by insurance.

The learned resident magistrate arrived at a different conclusion, being of opinion that a "contrary in-"tention" sufficient to exclude a body corporate was to be found in sub-section (2) which imposes on a person convicted of the offence a compulsory or automatic disqualification for holding or obtaining a licence (i.e., a driver's licence) under section 3 of the Motor Vehicles (Traffic and Regulation) Act (Northern Ireland), 1926; and this, he says, is a licence which a body corporate cannot hold or obtain.

I fully recognize that the drafting of sub-section (2) might have been improved upon by the introduction of some such words as "if eligible to hold a licence," which, Mr. Nicholson submitted, were implied, and must be read into the sub-section; but I am unable to accept the view that the absence of such words can have the far-reaching effect contended for, and which is involved in the conclusion arrived at by the resident magistrate. As has been said on many occasions, it is regarded as more reasonable to hold that the Legislature expressed its intention in a slovenly manner than that a meaning should be given to words which could not

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have been intended. I respectfully adopt the words of Lord Hobhouse in *Salmon v. Duncombe* (1) that it is a very serious matter to hold that when the main object of a statute is clear it shall be reduced to a nullity by the draughtsman's unskilfulness or ignorance of law. How, or on what principle, could Parliament have intended that the public lawfully using the public highway—the protection of whose interests was the primary object of this Part of the Act—should be so substantially deprived of that protection by the exclusion of such a numerous class as limited companies and other bodies of persons from the statutory obligations in regard to third-party insurance. No one has ever suggested, so far as I am aware, that the Northern Ireland Transport Board is not compelled to insure; yet it seems to me that, if limited companies are exempt, so must they be. It would, indeed, be a singular state of the law that in such cases no liability should attach to the owners and employers on whom the duty of effecting insurance naturally devolves, whilst the driver, who may have no knowledge of the existence of any insurance irregularity, may be subject to substantial penalties.

The magistrate would appear to have based his decision to a great extent upon the case of *Hawke v. E. Hulton & Co. Ltd.* (2), in which it was held that the defendants—a limited company—could not be found guilty of the offence created by section 41 of the Lotteries Act, 1823, since that section imposed upon the persons who should commit such offence the penalty of £50, and also provided that they should be deemed "rogues and vagabonds," and should be punished as directed by section 67 of the Act, namely by imprisonment. This latter section further provides that in the case of a second conviction the offender might, in addition to being imprisoned, be whipped. Whilst it is true that fifty-six years later section 4 of the Summary Jurisdiction Act, 1879, conferred in general terms a power to substitute a fine for imprisonment, yet it was clear that the Legislature, in passing the Lotteries Act, with its three forms of punishment which rendered

(1) (1886) 11 A.C. 627, 634. (2) [1909] 2 K.B. 93.

the offenders liable to be deemed rogues and vagabonds, to be imprisoned, and in certain cases to be whipped, could not have intended the Act to apply to limited companies, for whom *all* such forms of punishment would have been wholly inappropriate and incapable of being carried out. I would further add that it is difficult to see how the intention of Parliament in enacting such a special Act as the Lotteries Act, 1823, could be affected, and interpreted anew, by the general legislation of upwards of half a century later. Accordingly, I do not hesitate to say that that case on its facts is a very much stronger one in favour of the holding of a " contrary intention " than is the present in which the punishment first mentioned in the section is fine *or* imprisonment (the former of which can be imposed on a company), and in which the direction as to disqualification for a licence contained in section 6 (2) may most reasonably be interpreted as intended by Parliament to apply to those who either held or were eligible to hold a driver's licence. It is only by such interpretation that full effect can be given to what was in my opinion the primary aim and object of the Act.

The learned magistrate was also apparently affected by the case of *The Law Society v. United Service Bureau Ltd.* (1), in which it was sought to make a limited company liable to a penalty imposed by section 46 of the Solicitors Act, 1932, on " a person " not having in force a practising certificate, who wilfully pretends to be qualified or recognised by law as qualified to act as a solicitor. The section was held, and if I may respectfully say so, very naturally held, to contemplate a person who can have in force a practising certificate as a solicitor ; and, by section 43 of the Act, the possession of such a certificate is an essential condition to the qualification of any one to act as a solicitor. It was further clear—as Avory J. said " beyond possibility of argument "—that a corporate body could not pass the final examination provided for by the Act, and therefore could not apply to be admitted as a solicitor or be so admitted within

(1) [1934] 1 K.B. 343.

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section 3 of the Act. Hence the respondent company could not, in the opinion of the court, be brought within the words "any person" in section 46, which clearly connoted a natural person alone, and not an artificial person, such as a body corporate. The "contrary intention" required by sections 2 and 19 of the Interpretation Act, 1889, in order to confine the word "person" to a natural person, which was thus transparently clear, was strongly confirmed, as appears by the judgments of Avory and Charles JJ., by a consideration of the provisions of sub-section 3 of section 51, which imposed a penalty for an offence under that section, of imprisonment without any alternative remedy by way of a fine—a form of punishment which clearly could not be applied to a corporate body. I cannot regard *The Law Society v. United Service Bureau Ltd.* (1) when so understood, as governing the present case. It was a case, like *The Pharmaceutical Society v. London and Provincial Supply Association* (2), in which it was apparent that the "person" referred to in the section must, from the nature of his occupation, have a particular personal qualification which could not be possessed by a limited company or other corporate body. When referring to the Pharmaceutical Society case I should like to cite from the speech of Lord Blackburn who said : (3) :— "I am quite clear about this, that, whenever you can "see that the object of the Act requires that the word "'person' shall have the more extended or the less "extended sense, then, whichever sense it requires, "you should apply the word in that sense, and construe "the Act accordingly." After quoting this passage in *Hirst v. West Riding Union Banking Co.* (4), Stirling L.J. added it as his opinion in the case then before him : "The question, whether the word 'person' in "Lord Tenterden's Act includes a corporation, must "be judged of by considering the context and the "object of the enactment."

In conclusion, I would only add that if it be contended that this is a penal statute which should be

(1) [1934] 1 K.B. 343.
(2) (1880) 5 A.C. 857.
(3) Ibid. 869.
(4) [1901] 2 K.B. 560, 563.

construed strictly, it is also a remedial statute ; and in such a case, in the words of Dowse B. in *The Guardians of the Poor of the Enniskillen Union v. Hilliard* (1), "it "ought to be construed so that the intention of the "legislature may be carried out."

For the foregoing reasons I am of opinion that the question submitted to us should be answered in the negative. By consent there will be no costs of the Case Stated.

LOWRY J. : I respectfully concur in the judgment of the Lord Chief Justice. LOWRY J.

Appeal allowed.

Solicitor for the appellant : *Chief Crown Solicitor.*
Solicitors for the respondent : *C. A. MacKenzie & Co.*

J. McC.

(1) (1884) 14 L.R.Ir. 214, 223.

K.B.D. (Matrimonial) 1948.

July 29, 30; Oct. 14, 21.

GORDON (otherwise GREENE) v. GORDON (1).

Divorce—Nullity—Civil marriage ceremony to be followed by Jewish religious ceremony—Failure of party to participate in religious ceremony—Wilful refusal to consummate—Matrimonial Causes Act (Northern Ireland), 1939 (2 & 3 *Geo.* 6, *c.* 13), *s.* 9 (1) (*a*).

The petitioner and respondent, adherents to the Jewish faith, went through a ceremony of marriage at a Registrar's Office, it having been agreed between the parties that this should be followed by the religious ceremony customary among Jews. According to the usages of the Jewish faith consummation of the marriage is not permissible until after this religious ceremony. The respondent later refused to proceed with the religious ceremony, and the parties had never cohabited. Neither party at any time proposed consummation of the marriage, though the petitioner endeavoured to have the religious ceremony performed. On a petition for a decree of nullity on the ground of the wilful refusal of the respondent to consummate the marriage,

Held, that the failure of the respondent to consummate the marriage in these circumstances, being in accordance with the usages of the faith to which both parties adhered, did not constitute a wilful refusal to consummate the marriage.

Petition for nullity of marriage on the ground that the respondent had wilfully refused to consummate the marriage.

The facts of the case and the arguments of counsel appear in the judgment of the Lord Chief Justice.

Stewart for the petitioner.

There was no appearance for the respondent.

Cur. adv. vult.

Andrews L.C.J.

Andrews L.C.J. : The point in issue in this case is a short, though novel, one. On the 17th May, 1946, a ceremony of marriage was celebrated between the petitioner and the respondent at the Registrar's Office, in the City of Dublin, in accordance with the

(1) In the King's Bench Division (Matrimonial) before Andrews L.C.J.

provisions of the Marriages (Ireland) Act, 1844 (7 & 8 Vict., c. 81). Both parties are members of the Jewish faith, under which marriage has a twofold ceremonial character, first, the ordinary marriage under the civil law, and, secondly, a religious ceremony. The Rabbi Shachter gave evidence, on my invitation, in regard to the law and practice of Jewish marriages. Either of two methods may be availed of, the first of which is applicable to the present case. Under it the civil marriage ceremony is performed by licence from the Registrar in the Registrar's office; and, after the lapse of seven days, the Registrar forwards a certificate which permits of the performance of the religious ceremony. The civil marriage is binding on a Jew as a citizen of the country, but it does not constitute a marriage bond in Jewish religious law; and, accordingly, a couple who have contracted a civil marriage are in duty bound to undergo a religious ceremony in accordance with the usages of Jewish religious law. Normally the religious marriage takes place a month or six weeks after the civil marriage, but the precise interval of time is determined by the parties, and depends on the circumstances of each case. It may also be delayed during certain periods of the Jewish religious year when marriages are not solemnized. As the civil marriage does not constitute the marriage bond according to the law of the Jewish religion consummation is not permissible until after the religious ceremony; and it was admitted to me by the petitioner in her evidence, that, if either of the parties had made any advance to the other for consummation of the marriage prior to the performance of such religious ceremony he or she would have been acting contrary to the usages and principles of their faith. It was also admitted that in fact neither party did make any such advance towards consummation by conversation or otherwise, further than that the petitioner used her best endeavours to have the religious ceremony performed. Consummation, in terms, was never expressly sought. The petitioner further stated, and I accept her testimony, that as a result of her efforts towards that end, the respondent consented early in

K.B.D. (Matrimonial) 1948.

GORDON (OTHERWISE GREENE) v. GORDON.

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August to the religious ceremony being fixed to take place in Dublin, at the Greenville Hall, on the 22nd November, 1946. About the month of October—the petitioner could not remember the precise date—the respondent cancelled—or to use her own words "called off"—the date by letter which is not forthcoming, but in which letter he assigned as his reason for his conduct that he could not get a house. On receipt of this letter the petitioner came to Belfast, and had two interviews with the respondent which were obviously not of a harmonious character. In the course of these interviews the respondent declared that "it was all off"; and, in reply to her query as to why it was "all off", and as to what she had done to induce this state of affairs, he said that he "just "couldn't be bothered"; and, when she asked him further how she could mention it to her people, he replied that he was "not interested".

It is apparent that the petitioner felt her position keenly. She returned to Belfast to see the respondent in December, and suggested a new date for the religious ceremony—the 17th March, 1947; but, according to her evidence, the respondent gave no further undertaking than that he "would see". This interview was followed a couple of days later by a letter-card from the respondent which is forthcoming. It was addressed to the petitioner in her maiden name—Miss S. Green; and in the course of it he said that he was really serious about the whole affair; that he meant every word he had said; and that he really didn't think they could be happy together, for, as he had stated, they really had lost interest in each other; he knew it was hard, but he thought it was really the best for both of them. He ended with an intimation that he would be down in Dublin about the third week in June when they would discuss this thoroughly. In fact he never fulfilled this promise to go to Dublin, and the parties have not met since.

The petitioner had given the respondent a dowry of £600 upon their engagement, which he subsequently promised to repay by selling his business; but she stated it had never in fact been repaid. She assured me—

and I accept her evidence—that she was always willing and anxious to carry out the religious ceremony, and to live with the respondent as man and wife together. It is in these circumstances that the petitioner comes to this Court seeking a decree of nullity based upon the alleged wilful refusal of the respondent to consummate the marriage. The suit is undefended.

Mr. Stewart's industry on behalf of his client failed to produce any authority which in my opinion is really helpful in the unusual circumstances of this case. He bases his claim for the petitioner on the proposition that non-cohabitation, without reasonable excuse, amounts to a wilful refusal to consummate the marriage; and he relies strongly on the fact that, according to the petitioner's uncontradicted evidence, the respondent definitely agreed to the performance of the religious ceremony on the 22nd November, 1946. But the case of *Hutchings* (*otherwise Watson*) *v. Hutchings* (1) decided by His Honour Judge Jenkins on 1st May, 1947, to the judgment in which Mr. Stewart referred me and upon which he relies, appears to me to be essentially different from the present in this respect that there no question as to the sufficiency and completeness of the marriage ceremony, which had been performed in London, arose. A bedroom had been taken in an hotel for the joint occupation of husband and wife when, after apparently some acrimonious conversation, the wife, who was the petitioner, was forthwith sent back to Leicester from which they had come for the marriage, the husband thus denying her the intercourse which she said she had expected. In the present case it is as already stated, admitted that, instead of cohabitation being reasonably and naturally expected, intercourse would have been wholly contrary to the tenets and principles of the faith to which both parties adhered. A decree on the ground of "wilful refusal" would necessarily involve that these words are applicable to and may include a course of conduct which is prohibited by, or

(1) Unreported.

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is at least at variance with, the religious beliefs to which both parties concerned subscribe.

Neither do I get any assistance from the pronouncements of the House of Lords on the subject of wilful refusal to consummate a marriage which are contained in *Baxter v. Baxter* (1), or in the cases of *Cowen v. Cowen* (2) and *J. v. J.* (3) which the House overruled. The issue in such cases as to the meaning of the word "consummate," in the Matrimonial Causes Act, 1937, and as to the possibility of consummation when contraceptives are employed, has no bearing on the present case in which admittedly no intercourse whatever took place. On the same day, however, upon which the House of Lords gave judgment in *Baxter v. Baxter* (1), namely, the 17th December, 1947, the House also gave judgment in *Horton v. Horton* (4), which was a suit by a husband against his wife for a decree of nullity based upon alleged refusal to consummate the marriage. The facts again are wholly different from those in the present case; but the case appears to me to be helpful in two respects. In the first place, Lord Jowitt L.C., whilst expressing the opinion that it was undesirable to attempt any definition of the phrase "wilful refusal to consummate the marriage," stated that the words connote, he thought, a settled and definite decision come to without just excuse; and, secondly, that, in determining whether there has been such a refusal, the judge should have regard to the whole history of the marriage.

Having given the matter much anxious thought and having carefully considered the views thus expressed by Lord Jowitt, I find it impossible to say that the petitioner has discharged the onus of proof imposed upon her. It seems to me to be impossible to say that the respondent has "wilfully refused "consummation" when it is admitted that the marriage ceremonies had only reached a stage at which intercourse, and, therefore, consummation were forbidden by the rites and practices of the faith to

(1) [1948] A.C. 274.
(2) [1946] P. 36.
(3) [1947] P. 158.
(4) [1947] 2 All E. R. 871.

which they both belong and to which, according to the petitioner's evidence, they both adhered. In my opinion there is in the present case a "just excuse" within the meaning of those words as used by the Lord Chancellor for a course of conduct which both parties recognise to be in accordance with the tenets and usages of their faith.

To this line of thought Mr. Stewart replies that by refusing to fulfil his promises in regard to the religious ceremony the respondent has, of his own volition, "closed the door against consummation". "The "one", he says, "automatically follows upon the "other." It may well be that this is so; yet it does not in my opinion follow that the refusal to proceed with the religious ceremony must be regarded as a wilful refusal to consummate the marriage. There may be many reasons or motives for refusal to complete the latter part of the marriage ceremonies other than reluctance to, or a determination not to consummate the marriage. It may be, as the respondent stated in the letter-card, that he was of opinion that they couldn't be happy together, and that they had lost interest in each other. It may be—and one sentence in the petitioner's evidence rather suggested this—that he had developed an attachment for another woman. It may be that his love for the petitioner had entirely gone, and that he thought it better to retract from the marriage, and from a lifetime of unhappiness, whilst in his opinion there was yet time. All of these are possible explanations, and others might also be added as reasons for the respondent's conduct in refusing to proceed with the religious ceremony, and yet none of them would be motivated by a wilful refusal for consummation.

In my opinion the respondent in this case never wilfully refused consummation; for consummation never was suggested. He only refused to complete the Jewish marriage for which refusal some other remedy may be open and appropriate, but not a decree of nullity.

It may well be—but I am expressing no opinion and am giving no direction of proofs—that when the

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necessary statutory period of three years has elapsed the petitioner may be entitled to obtain relief on the grounds of desertion from a position in which she has my full sympathy, even though she does not obtain my decree ; but in these present proceedings I cannot allow any feelings of sympathy for her to induce me to extend the grounds for a decree of nullity, as in my opinion I would be doing, beyond those contemplated and provided for by the legislature.

There will be no order as to costs.

Solicitor for the petitioner : *L. I. G. Fox.*

J. McC.

SMYTH v. SMYTH AND GRAY (1).

K.B.D. (Matrimonial) 1948.

Feb. 13, 26.

Divorce—Evidence—Signature of wife in Register of Births proved by husband—Evidence of non-access proved aliunde—Rule in Russell *v.* Russell.

On the hearing of a husband's petition for divorce on the ground of adultery the evidence of the petitioner who tendered a certificate of an entry in the Register of Births showing the birth of a child to the respondent and testified that the original entry was signed by the respondent was admitted to prove the fact and date of the child's birth; but evidence that the spaces reserved in the Register for the name, address and rank of the father had been left blank was rejected as being evidence by a spouse tending to bastardise a child born in wedlock. Evidence of non-access given *aliunde* was admitted, notwithstanding that when coupled with the birth certificate it had the effect of establishing the illegitimacy of the child.

Park v. Park and McBride [1946] N.I. 151 applied.

PETITION for divorce by a husband against his wife on the ground of adultery.

The facts and argument of counsel are summarised in the judgment of the Lord Chief Justice.

Hanna K.C. (with him *McLoughlin*) for the petitioner.

There was no appearance for the respondent or co-respondent.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J.: This is a husband's petition for divorce grounded on his wife's alleged adultery with the co-respondent, Gray. The petitioner was married to the respondent on the 4th September, 1940. He joined the Royal Air Force in June, 1941; and, from the evidence given by Colonel Davidson, with the leave of the court, from a duly authenticated certificate based on official records, it is established that the petitioner embarked for overseas service on the 11th

(1) In the King's Bench Division (Matrimonial) before Andrews L.C.J.

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July, 1942, from which he did not return until the 8th May, 1945. Adultery by the respondent with the co-respondent is alleged in the petition to have taken place in January, 1944. There is no direct proof of such adultery; but it is sought to establish it inferentially by production of a certificate of an entry of birth of a female child to the respondent on the 2nd October, 1944, coupled with Colonel Davidson's evidence of non-access. This birth certificate, whilst leaving blanks for the name, address and rank or profession of the father of the child, gives the respondent's name as the mother of the child, and also as the informant. The certificate was produced in evidence by the petitioner himself, who stated that it was a correct copy of the original entry which he saw when he attended at the District Registry Office in Ballymoney, and that the signature in such original entry was his wife's.

The only question of any difficulty which arose in the case was whether the admission in evidence of this birth certificate, the contents of which were supplied by the respondent, offended against the rule in *Russell v. Russell* (1). This issue is one of vital importance to the petitioner owing to his inability to produce as witness the maternity nurse or other person present at the birth.

Mr. Hanna, who argued the case with great clearness and persuasiveness at the adjourned hearing, at once disclaimed any intention on his part to rely upon the blanks in the certificate in regard to the father of the child; for any inference drawn from such circumstances would clearly be inadmissible as tending to bastardise the child. He submitted, however, that he was entitled to rely upon the certificate for the purpose of proving the fact and the date of the birth of the child; and that this evidence was not rendered inadmissible by the evidence of non-access, which was not given by either of the spouses, but was proved *aliunde*.

From the views which I expressed in *Park v. Park* (2), it will be readily appreciated that I have no desire to

(1) [1924] A.C. 687. (2) [1946] N.I. 151, 158.

extend the principle of *Russell v. Russell* (1), or to apply it to different facts and circumstances not then contemplated by the learned Law Lords. The sole question in *Russell v. Russell* (1) was as to the admissibility or non-admissibility of evidence of non-access given by the husband, when there was an opportunity of access, such evidence being given with the object of proving that a child born to his wife was not his child, and that therefore she had committed adultery. An objection to the evidence was overruled at the trial and the evidence admitted. This view was upheld by the Court of Appeal, but set aside by a majority in the House of Lords. The foundation for this ruling by the House of Lords was Lord Mansfield's judgment in the year 1777 in *Goodright v. Moss* (2), when he said : "The law of England is "clear, that the declarations of a father or mother, "cannot be admitted to bastardize the issue born after "marriage" ; and again : "As to the time of the birth, "the father and mother are the most proper witnesses "to prove it. But it is a rule, founded on decency, "morality, and policy, that they shall not be permitted "to say after marriage, that they had no connection, "and therefore that the offspring is spurious ; more "especially the mother, who is the offending party." *Goodright v. Moss* (2) was a legitimacy case ; and the problem for the House in *Russell v. Russell* (1) was whether this rule, universally accepted as the law in such proceedings, applied in divorce. The House held that it did, being of opinion that it was a rule which wisely and properly protected the sanctity of married intercourse ; that it was, accordingly, not limited to any special class of case, but was, as the Earl of Birkenhead said, "a general rule to be applied in the "full generality of its scope, to all cases which it is "wide enough to cover" (3). By these latter words the learned Lord Chancellor doubtless meant to all cases in which, irrespective of their form, the question of legitimacy arose. It is not permissible by such evidence to rebut the strong presumption that the

(1) [1924] A.C. 687.
(2) (1777) 2 Cowp. 591, 592, 594.
(3) Ibid. 704.

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child of a married woman was begotten by her husband. Whilst holding, accordingly, that the husband's evidence was inadmissible—and this was really the beginning and end of the case—the House at the same time affirmed the opinion, upon which, of course, there is no room for doubt, that in every case non-access can be proved by evidence *aliunde*.

Having so recently reviewed the authorities subsequent to *Russell v. Russell* (1) in *Park v. Park* (2), it is wholly unnecessary for me to do so again. Suffice it to say that they merely apply, and do not extend, the principle of *Russell v. Russell* (1). Some of the cases, however, such as *Warren v. Warren* (3) show its true limitations. Swift J. had before him in that case confessions by the wife of adultery and her consequent pregnancy, and also the registration of the birth of a child by the wife without, as in the present case, the naming of the father. There was no evidence of non-access by either spouse, or *aliunde*, and the learned judge in granting a decree acted solely upon the wife's confessions. When once the truth of these confessions was accepted the case was in my opinion a perfectly clear one ; for, in the absence of any evidence of non-access, the strong presumption of legitimacy prevailed, and the confession of adultery on the part of the wife had not the effect of bastardizing the child. "The only "evidence," said Swift J., "by which the presumption "that a child born in wedlock is legitimate can be "rebutted is by proof that at the time of conception "the husband had no sexual intercourse with his wife. "This may be proved by independent evidence showing "that they were physically apart at the moment when "conception must have taken place ; it may be proved "by other means ; but it is clear that it cannot be "proved by the evidence either of the husband or the "wife proving either non-access or non-intercourse. "But when that has been said, it seems to me that all "that *Goodright v. Moss* (4) and *Russell v. Russell* (1) "lay down has been said" (5).

(1) [1924] A.C. 687.
(2) [1946] N.I. 151.
(3) [1925] P. 107.
(4) [1777] 2 Cowp. 591.
(5) [1925] P. 107, 111.

This view is, I may claim, strongly corroborative of that which I have already expressed as to the scope and true meaning of the decision in *Russell v. Russell* (1).

It is in these circumstances that I have come to the following conclusions :—

(*a*) It was competent for the petitioner, who had himself examined the original register, and who testified to his wife's signature, to produce in evidence the certificate of birth. Its contents as to the fact and date of the birth of a female child to his wife, though supplied by her, are legally admissible in evidence, for in themselves they do not bastardise the child. On the other hand, the blanks which are left in the places reserved for the name and rank of the father must be rejected. Whilst they prove nothing directly in themselves, they cannot be relied upon by the petitioner as the foundation for an inference that the petitioner was not the father, for any such inference would tend to bastardise the child. It would, of course, be absurd that a blank as to the paternity of the child should warrant the court in arriving at conclusions which would not be justified if the true father's name were stated. I see no difficulty in thus accepting part of the certificate as legal evidence and in rejecting the remainder : see judgment of Hill J. in *Rimmer v. Rimmer* (2).

(*b*) The evidence of non-access, being drawn entirely from a source other than the husband and wife, is recognised as clearly admissible in *Russell v. Russell* (1), and in all subsequent relevant authority. It is admissible as a factor in the proof of adultery which is all that is material in the present case ; and in my opinion it could not have been rejected merely because, when coupled with the birth certificate which had been previously proved by the petitioner, it had the effect of establishing the illegitimacy of the child. No decided case compels such a conclusion ; and I decline so to hold unless required to do so by higher authority.

(1) [1924] A.C. 687.

(2) (1930) 46 T.L.R. 624, 625.

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For these reasons I hold that the evidence was properly admitted and accepted by me at the trial to the extent and for the purpose that I have indicated.

As regards the co-respondent, I have in evidence a letter written by him to the respondent on the 19th October, 1944—seventeen days after the birth of the child—which contains the clearest admission of adultery, and of his paternity of the child. In the circumstances I grant a decree for the dissolution of the petitioner's marriage with the respondent on the ground of the respondent's adultery with the co-respondent, and allow the usual limited costs of a poor person's case against the co-respondent.

Solicitors for the petitioner: *Daniel MacLaughlin & Son.*

M. V. P.

KELLY v. RAFFERTY (1).

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July 9, 16.

Practice—Parties—Adding a defendant—Objection of plaintiff—R.S.C. Order xvi, r. 12.

The court will not under Order xvi, r. 12, direct the joinder of a person as defendant who is not a necessary party to the maintenance of the action which the plaintiff has determined upon, and so compel the plaintiff to make a new claim inconsistent with the one which he has previously made.

A. sued B. for the balance due under a contract for the sale of trees. An application under Order xvi, r. 12, by C. to be made a defendant, alleging that the contract had been made between A. and C., and that he, C., wished to counterclaim for damages for breach of contract, was refused.

Montgomery v. Foy, Morgan & Co. [1895] 2 Q.B. 321 distinguished.

APPLICATION by James J. Rafferty, the son of the defendant in this action, for an order that he might be made a defendant, and that the writ of summons and all subsequent proceedings should be amended accordingly.

The facts and arguments of counsel are stated in the judgment.

Bready for the applicant and for the defendant.

Brown for the plaintiff.

Cur. adv. vult.

ANDREWS L.C.J.

ANDREWS L.C.J. : The plaintiff in this case is a farmer who sues the defendant, a contractor, for £150, being the balance due to him for the price of trees which he alleges that he sold to the defendant. No defence has yet been delivered, and no affidavit by the defendant has been filed on this motion which is brought by the defendant's son, James J. Rafferty, for an order that he might be made a defendant, and that the writ of summons and subsequent proceedings be amended accordingly.

(1) In the King's Bench Division before Andrews L.C.J.

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The ground upon which James J. Rafferty relies in support of his application is that the contract for the sale of the trees, which was admittedly oral, was, as he alleges, entered into by the plaintiff with him, not with his father who was merely present at the time that it was made ; that he wishes to counterclaim for damages for breach of the contract ; and that he is embarrassed by the fact that the plaintiff claims that the contract was not entered into with him. In reply the plaintiff asserts in positive terms that his contract was with the defendant ; and that at the time when the agreement was made the defendant paid him the sum of £50 on account, for which credit is given in the writ, the balance of the contract price, namely, £150, to be paid before any trees were cut. It is unnecessary to refer further to the facts or merits of the case, as the matter in issue in the present application is really one of procedure.

The applicant relies on the provisions of Order 16, r. 12. This rule, so far as is material, provides that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and that the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The rule next empowers the court or a judge to order that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

Before considering the authorities cited in argument I should prefer to express my own view upon this rule and generally upon an application of this nature. The rule, no doubt, is wide in its scope. Its principal object, to be found in its opening words, is to prevent the defeating of any cause or matter by reason of the mis-joinder or non-joinder of parties. At the same time, I can find no words in it which enable the court, either at the instance of a third person whom the plaintiff deliberately refrains from suing, or of its own

motion, to direct the joinder of a person as defendant who is admittedly not a necessary party to the maintenance of the action which the plaintiff has determined upon, and which he believes that he can bring to a successful issue. Likewise, the rule contains no words which would justify the conclusion that the court will compel the plaintiff to make a new claim inconsistent with, and, therefore, in effect in substitution for, the one which he has made. On the contrary, I find in the rule words such as "the Court may in every cause "or matter deal with *the matter in controversy*," and again "in order to enable the Court effectually and "completely to adjudicate upon and settle all the "questions *involved in the cause or matter*," which clearly indicate to my mind that the framers of the rule had only in contemplation, as one would naturally suppose that they would have, such amendment of parties as would enable the court finally and completely to determine the rights and interests of all parties in the action actually before the courts.

Let us next consider the consequences to the plaintiff if the order sought were made. His first, and not his least, difficulty would be that he would be forced, contrary to his own judgment and his own view of the facts, to plead a cause of action against the applicant, which would be inconsistent with the case which he has already made; and he would be fully conscious, whilst he was doing so, that, as he would fail at the trial to produce even prima facie evidence of such cause of action against the applicant, a direction would be given against him at the close of his case, with the usual consequences in regard to costs. No court has ever forced a plaintiff into such an impossible position. Even this age of "controls" has never produced such a "control" as to tell a plaintiff, where the liability is admittedly alternative and not joint, that he will not be allowed to proceed with his cause of action against A. unless he is prepared to plead the same cause of action arising out of the very same transaction against B.

A further consideration which weighs with me, though not necessarily conclusively, is that this

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application is made on behalf of the son, James J. Rafferty, alone, not as in the case of *Montgomery v. Foy, Morgan & Co.* (1), on behalf of the third party and the defendant jointly. It is not, as I have already stated, supported by any affidavit on behalf of the defendant suggesting that he is in any way embarrassed or prejudiced by the form of the present proceedings. Indeed, it would appear that the defendant has not even been served with notice of the application—a circumstance, in itself, of some irregularity. At the same time Mr. Bready, on behalf of the applicant, states that the defendant would be embarrassed in his defence by the fact that he cannot deny the contract and also plead a counter-claim. Of course that is necessarily so ; the counterclaim, if any, must be made by the contracting party, whoever that may be. But that is no sufficient reason for forcing the plaintiff to make a case which he could not substantiate by evidence, or to introduce as a defendant a young man, who is described by the plaintiff in his unanswered affidavit as working with his father, and who, to the best of his, the plaintiff's, knowledge, has no means whatever.

Another thought which has occurred to me should be mentioned. It is that the applicant appears to me to be faced with the following dilemma. If the present defendant—the father—succeeds, that is, if it be held that the plaintiff's contract was not entered into with him, there will be no necessity for any counterclaim. If, on the other hand, the defendant fails, the contract being held to have been entered into with him, the present applicant, even if I were to join him as a defendant, would not be entitled to maintain a counter-claim for breach of a contract to which it would have been established he was not a party.

These being the views which I entertain on the general merits and also upon the legal aspects of the case as I understand them, it only remains to be considered whether they are in any way at variance with settled authority. In my opinion they clearly are not. Mr.

(1) [1895] 2 Q.B. 321.

Bready has pressed me with the two cases of *Montgomery v. Foy, Morgan & Co.* (1), and *Moser v. Marsden* (2). In the former case cargo had been placed by a shipowner in the custody of a warehouseman with notice of a lien for freight. The consignees, who had no property in the cargo but were merely agents of the shippers for the sale of it, in order to obtain possession of it deposited the amount of the freight with the warehouseman, with a notice to retain it under section 496 of the Merchant Shipping Act, 1894. The shipowner thereupon brought an action against the consignees for a declaration of title to the money so deposited, and for an order for payment of it to him. The court held that there was jurisdiction under the English rule corresponding to our Order 16, r. 12, to order that the shippers of the cargo should be added as defendants in order that they might counterclaim against the plaintiff damages for short delivery and injury to cargo. That case appears to me to be entirely different from the present. The application was there made, not by the shippers alone, but by them jointly with the defendants ; and the order made by the court in no way compelled the plaintiff to make a new case different from and inconsistent with that which he had already made. There was no conflict of interests or liabilities as between the shippers and the defendants the consignees. The latter were merely agents for the former ; but, having no property in the cargo, they could maintain no counterclaim or set-off for short delivery or injury to the cargo. The court in these circumstances most properly allowed the principals of the defendants, namely, the shippers of the cargo, who were the persons really liable for the freight, to be added as defendants in order to permit of such counterclaim and so in the words of the rule " to enable the " court effectually and completely to adjudicate upon " and settle all the questions involved in the cause or " matter." Such joinder prevented " the useless and " expensive formality of having two separate actions " without causing the slightest embarrassment in pleading or otherwise to the plaintiff. The passage from Lord

(1) [1895] 2 Q.B. 321. (2) [1892] 1 Ch. 487.

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Esher's judgment, at page 324, upon which Mr. Bready relied, must be read in the light of the facts of that case, and must not be given a wider and more general meaning or application than he ever intended that they should possess. Kay L.J., in the opening words of his judgment, guards himself against any such interpretation of the rule as that in all cases it would be a sufficient reason for joining a person as defendant, that, if joined, he would have a counterclaim against the plaintiff. With these words I respectfully and unreservedly express my full concurrence.

Mr. Bready's other case of *Moser v. Marsden* (1) does not in my opinion assist him. The plaintiff, who was the patentee of a machine, brought an action against the defendant for using a machine which he alleged was an infringement. The maker and patentee of the defendant's machine applied to be added as defendant, alleging that a judgment in the action would injure him, and that the defendant would not efficiently defend the action. The Court of Appeal refused to make the order; but Mr. Bready says that this was solely on the ground mentioned by Lindley L.J., at page 490, that the applicant's interest might be affected commercially, but not legally, by a judgment against the defendant. That, it may be admitted, was a sufficient reason for refusing to make the order sought; but in my opinion Mr. Bready is straining the words of the learned judge beyond anything which they were intended to convey when he contends that they imply that every person who may indirectly be legally affected by a judgment, as would be the applicant in the present case, has a right of his own motion to be joined as defendant. If such was the intention of the Lord Justice I cannot agree with it. The rule was not intended to, and does not apply to such a case.

Such are the cases relied upon by Mr. Bready, but they do not exhaust authority on the subject. *Norris v. Beazley* (2), and *Hood Barrs v. Frampton, Knight & Clayton* (3), are strongly against the applicant's right

(1) [1892] 1 Ch. 487.
(2) (1877) 2. C.P.D. 80. (3) [1924] W.N. 287.

to the order sought. I do not consider it necessary to examine the cases in detail. It will suffice for me to say that I fully share the view expressed by Lord Coleridge C.J. in the former case, at page 84, that the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint which ought to be determined in the action; and that the rule was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any. It was not intended that persons should be added as defendants merely for the convenience of another defendant, between whom and the party sought to be added there may be questions which would afterwards have to be settled. Denman J. expressed himself very much to the like effect when he said: "I am quite "clear, however, that the Court ought not to bring in "any person as defendant against whom the plaintiff "does not desire to proceed, unless a very strong case "is made out, showing that in the particular case "justice cannot be done without his being brought "in." (1).

Norris v. Beazley (2) was cited and obviously accepted as good law in *Hood Barrs v. Frampton, Knight & Clayton* (3), where Eve J., when refusing an order sought by the defendants for the addition of another person as defendant, said that, convenient as it would no doubt be to have the whole matter discussed, the defendants could not claim to have it decided on the record as it stood; and he, accordingly, declined to make the order for adding a defendant against whom no relief was sought.

Perhaps I should say, in order to prevent possible misapprehension in the future, that I am not to be understood as holding the view that in no case will a person be added as defendant to an action without the plaintiff's consent. *Wilson v. Church* (4), which is referred to in *McCheane v. Gyles* (*No.* 2) (5), is an illustration of a well-recognized exception to that

(1) (1877) 2 C.P.D. 80, 85.
(2) (1877) 2 C.P.D. 80.
(3) [1924] W. N. 287.
(4) (1878) 9 Ch. D. 552.
(5) [1902] 1 Ch. 911, 915.

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general principle, namely, where it is alleged that a person, made party to proceedings in a representative capacity, appears to the court not to be truly representative of the whole class.

I shall add nothing further except to say that no case has been cited, and in my opinion no case is to be found, except in a representative action, in which a person, not a party, and against whom no relief is claimed by the plaintiff, was joined as a defendant at his own request, and solely on his own application, against the will of the plaintiff who had deliberately refrained from making any claim or seeking any relief against him. In my opinion such an order could not be supported; and I, accordingly, must refuse the present application with costs.

Application dismissed.

Solicitors for the applicant and the defendant: *P. & J. Boyle.*

Solicitors for the plaintiff: *Daniel MacLaughlin & Son.*

M. V. P.

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ADMINISTRATION—*Testator's executors prove will—Last surviving executor dying intestate—Executor of last surviving executor omitting to prove his will—Application by testator's widow for administration with will annexed—Grant ad colligenda bona—Jurisdiction of court—The Probates and Letters of Administration Act (Ireland)*, 1857 (20 & 21 *Vict., c.* 79), *s.* 78. A testator by his will appointed two executors and after making some bequests left his residuary estate, including a farm of land registered in the testator's name under the Local Registration of Title (Ireland) Act, 1891, to his widow and daughter in the proportions of one-third and two-thirds respectively. Both executors duly proved the will and later died. The surviving executor died testate having appointed his nephew to be his executor, but the nephew ignored requests to prove his uncle's will. The testator's widow and daughter having agreed to sell the farm and being unable to make title thereto as it remained registered in the testator's name, an application was made to the court for a grant to the widow of letters of administration de bonis non under The Probates and Letters of Administration Act (Ireland), 1857, s. 78, or, alternatively, a grant ad colligenda bona to remain operative till the nephew proved his uncle's will. *Held*, that the court had power to make a full grant to the applicant limited only until the nephew should obtain probate of his uncle's will. *In the Goods of Gilkinson.* .. .. .. [K.B.D. 42

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DEFAMATION—LIBEL—*Trade dispute—Handbill printed for distribution by agents of trade union in trade dispute—Liability of printers—Privilege—Malice of trade union imputed to printers—Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *s.* 4 (1). The plaintiffs, proprietors of an inn, were involved in a trade dispute with a trade union which was endeavouring to establish the principle of "the closed "shop" among the plaintiff's employees. In the course of the dispute an official of the trade union composed a handbill defamatory of the plaintiffs, and this was printed by the defendants in the ordinary course of business and distributed by agents of the union in the vicinity of the plaintiffs' inn. There was no direct publication by the defendants other than the act of handing over the printed copies of the handbill to the trade union official who had composed it. In an action for damages for libel the defendants pleaded that there was no publication by them, and that the libel was not actionable by reason of s. 4 of the Trade Disputes Act, 1906. They also pleaded the defences of fair comment and privilege. *Held*, (i) that the handing over by the defendants of the printed copies of the handbill to the person who had composed it was not itself a publication, but that as the defendants must be taken to have

known that the handbills were to be published they were responsible in law as joint tortfeasors with the trade union for the subsequent publication by the latter's agents; (ii) that the immunity enjoyed by the trade union by virtue of section 4 (1) of the Trade Disputes Act, 1906, did not extend to confer a similar immunity on a joint tortfeasor; (iii) that the defence of fair comment failed as the defamatory document contained allegations of fact which were not truly stated; (iv) that the publication of the libel was prima facie privileged in that the trade union had an interest in communicating the contents of the handbill to actual or potential customers of the inn, but that this prima facie privilege was avoided by reason of the facts that (*a*) the handbill had been distributed indiscriminately and to persons not being actual or potential customers, and (*b*) that the union was guilty of malice in publishing the libel, and that this malice on the part of the union could be imputed to the defendants as joint tortfeasors. *Smith v. Streatfeild* [1913] 3 K.B. 764 approved. *Eglantine Inn, Ltd. v. Isaiah Smith and William Smith* .. .. [K.B.D. 29

DIVORCE—CONDONATION—*Adultery—Condonation of adultery—Subsequent desertion for less than statutory period—Revival of condoned adultery.* A wife's adultery was condoned by the husband who forgave her and resumed cohabitation. Later the wife deserted the husband. The husband petitioned for divorce on the ground of the original adultery after the desertion had continued for six months. *Held*, that desertion for this limited period was sufficient to revive the condoned adultery. *Beard v. Beard* [1946] P. 8 approved. *Cooke v. Cooke* [K.B.D. 46

——CRUELTY—*Whether malignity a necessary ingredient.* Malignity is not an essential ingredient in the matrimonial offence of cruelty. *Squire v. Squire* [1947] 2 All. E. R. 529 disapproved and not followed. *Ward v Ward* .. .. [K.B.D. 60

——EVIDENCE—*Signature of wife in Register of Births proved by husband—Evidence of non-access proved aliunde—Rule in* Russell *v.* Russell. On the hearing of a husband's petition for divorce on the ground of adultery the evidence of the petitioner who tendered a certificate of an entry in the Register of Births showing the birth of a child to the respondent and testified that the original entry was signed by the respondent was admitted to prove the fact and date of the child's birth; but evidence that the spaces reserved in the Register for the name, address and rank of the father had been left blank was rejected as being evidence by a spouse tending to bastardise a child born in wedlock. Evidence of non-access given *aliunde* was admitted, notwithstanding that when coupled with the birth certificate it had the effect of establishing the illegitimacy of the child. *Park v. Park and McBride* [1946] N.I. 151 applied. *Smyth v. Smyth and Gray* .. [K.B.D. 181

——NULLITY—*Civil marriage ceremony to be followed by Jewish religious ceremony—Failure of party to participate in religious ceremony—Wilful refusal to consummate—Matrimonial Causes Act (Northern Ireland)*, 1939 (2 & 3 *Geo.* 6, *c.* 13), *s.* 9 (1) (*a*). The petitioner and respondent, adherents to the Jewish faith, went through a ceremony of marriage at a Registrar's Office, it having been agreed between the parties that this should be followed by the religious ceremony customary among Jews. According to the usages of the Jewish faith consummation of the marriage is not permissible until after this religious ceremony. The respondents later refused to proceed with the religious ceremony, and the parties had never cohabited. Neither party at any time proposed consummation of the marriage, though the petitioner endeavoured to have the religious ceremony performed. On a petition for a decree of nullity on the ground of the wilful refusal of the respondent to consummate the marriage. *Held*, that the failure of the respondent to consummate the marriage in these circumstances, being in accordance with the usages of the faith to which both parties adhered, did not constitute a wilful refusal to consummate the marriage. *Gordon (otherwise Greene) v. Gordon* [K.B.D. 174

EMERGENCY LEGISLATION—AGRICULTURE—*Import of livestock into United Kingdom — Application by Minister for forfeiture order—Application to be made "as soon as practicable"—Limitation of defences which owner is entitled to raise in proceedings—Ultra*

vires—Invalidity—Agriculture (Miscellaneous War Provisions) Act, 1940 (3 & 4 *Geo.* 6, *c.* 14), *s.* 28 (3)—*Livestock (Import from Eire and Isle of Man) Regulations*, 1945 (*S. R. & O.*, 1945, *No.* 942), *reg.* 5. Section 28 (3) of the Agriculture (Miscellaneous War Provisions) Act, 1940, empowered the Minister of Food to make regulations relating to the import of livestock from Eire and the Isle of Man. Under this power the Minister made the Livestock (Import from Eire and Isle of Man) Regulations, 1945, which prescribed the times and places at which livestock might be imported from Eire and the Isle of Man, and contained provisions as to the seizure of livestock imported in contravention of the regulations. By regulation 5 (4) it was provided that every animal so seized should be forfeited unless within twenty-one days after a seizure notice had been displayed the claimant gave notice that the animal was his property and that it had not been imported from Eire nor the Isle of Man, or had not been so imported in contravention of the regulations, " whereupon the appropri- " ate Minister shall as soon as practic- " able apply to the Court of Summary " Jurisdiction " for a forfeiture order. By regulation 5 (5) it was provided that upon the application to the court for a forfeiture order the court should make such order " unless the claimant " proves to the satisfaction of the " Court that the animal was at the " time of seizure his property, and that " it was not imported or brought into " the United Kingdom from Eire or " the Isle of Man, or was not so im- " ported or brought in or dealt with in " contravention of these Regulations, " and the claimant shall not be " entitled to raise any other defence " or objection to the making of the " order." On the 14th August, 1946, twenty-one animals belonging to the claimant were seized by an authorised officer who had reason to suppose that they had been imported in contravention of the regulations. The seizure notice in respect of these animals was displayed on the 16th August, 1946, and on the same day the claimant gave notice claiming the animals. The Minister gave instructions on the 10th September, 1946, for forfeiture proceedings to be taken, and these instructions were received by the Crown Solicitor for Tyrone on the 13th September, 1946. The first petty sessions held thereafter was on the 16th September, 1946, but the summons was not issued until the 18th September, 1946, and the case came on for hearing on the 7th October, 1946. The resident magistrate made a forfeiture order in respect of thirteen of the animals and declared the other eight not to be forfeited. Both the claimant and the Minister appealed to the Court of Quarter Sessions. It was contended for the claimant that the application for a forfeiture order must be made " as soon as practicable " after a claim had been made, and that the application in this case had not been so made. On behalf of the Minister it was contended that the regulations required the application to be made " as soon as practicable " after the expiration of twenty-one days from the display of the seizure notice. It was further objected on behalf of the Minister that the provisions of regulation 5 (5) prevented the claimant raising the defence that the application had not been made as soon as practicable. The county court judge held that on the true interpretation of the regulations the application for a forfeiture order must be made as soon as practicable after a claim has been made; that the application in this case had not been made as soon as practicable; that regulation 5 (5) which purported to limit the defences which a claimant could raise in forfeiture was *ultra vires;* and that even if regulation 5 (5) were *intra vires* it could only have application to a properly constituted application which had been made as soon as practicable. On appeal by way of case stated *held* by the Court of Appeal (Babington and Porter L.JJ. and Black J.), (i) that the words " as soon as practicable " in regulation 5 (4) meant as soon as practicable after a claim had been made, and that there was evidence entitling the county court judge to find that the application had not been made as soon as practicable; (ii) that the provisions of regulation 5 (5) which purported to limit the defences which a claimant might raise in forfeiture proceedings could only apply to an application duly brought as soon as practicable. *Held* also by Babington and Porter L.JJ. (Black J. reserving his opinion on that point) that regulation 5 (5) was *ultra vires:* by Babington and Porter L.JJ. on the ground that the Act did not authorise the Minister

to make regulations to interfere with the procedure of the courts; and by Babington L.J. on the further ground that regulations made by Ministers must recognise the right of the subject to appeal to the courts and there present his case free from arbitrary limitations. *Minister of Agriculture for Northern Ireland v. McCartney.* [C.A. 1

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FAMILY ARRANGEMENT—RE-SETTLEMENT—*Non-disclosure of forfeiture clause—Independent advice—Rectification—Delay—Acquiescence.* A father and son who were entitled under two settlements as tenant for life in possession and tenant in tail in remainder respectively concurred in a re-settlement on the coming of age of the son, the father bringing into the re-settlement certain lands of which he was seised in fee simple. By the re-settlement the properties comprised therein were limited to the father for life, then to the son for life, with divers remainders over including remainders to the son's children in tail. At the instance of the father a forfeiture clause was inserted in the re-settlement by which if any person entitled under the re-settlement as tenant for life or tenant in tail by purchase should become a Roman Catholic or profess that he or she was of the Roman Catholic religion the property should pass under the settlement as if such person were dead without issue. The son was not consulted about this clause and did not know of its insertion, and he executed the re-settlement in ignorance that the clause was contained therein and without professional advice. *Held*, that the forfeiture clause was such an unusual provision in a re-settlement that it should have been brought to the attention of the son and he should have been given professional advice as to its nature and effect, and as this had not been done the son acquired a right to have the re-settlement rectified by the deletion of the clause; but that as after events giving rise to a forfeiture had occurred the son had acted so as to lead the remainderman next entitled in the event of a forfeiture to believe that he had accepted the validity of the clause, he was barred by laches and acquiescence from asserting his right to rectification. *Held*, further, that the son's children who claimed under the re-settlement had a similar right to that of the son to have the re-settlement rectified by the deletion of the forfeiture clause, and that such children were not bound by the laches or acquiescence of their father; and that accordingly the right of such children to have the re-settlement rectified was not barred. *McCausland and others v. Young and others* .. .. [Ch.D. 72

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LANDLORD AND TENANT—RENT RESTRICTIONS ACTS—*Recovery of possession — "Greater hardship"—Relevant matters for consideration—Rent and Mortgage Interest (Restrictions) Act (Northern Ireland)*, 1940 (4 & 5 *Geo.* 6, *c.* 7), *s.* 8 (1) (*e*) (ii). A landlord sought possession of a dwelling-house, occupied by a tenant and his family for twenty years and to which the Rent Restrictions Acts applied, for H. who was a person engaged in the landlord's whole time employment. H. occupied rent free a house belonging to R. who needed it for an agricultural worker employed by R. When determining, pursuant to the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940, section 8 (1) (*e*) (ii), whether greater hardship would be caused by refusing to grant the order than by granting it, the county court judge considered (i) the personal hardship to the landlord; (ii) the hardship to H. in having to travel daily a considerable distance to and from his work and the insecurity of tenure of the house which he occupied; (iii) the hardship to H.'s child, aged 11 years, who had to travel two miles to school;

and (iv) the hardship to R. who needed for his employee the house occupied by H. ; and he gave a decree for possession. *Held*, that the county court judge was entitled to consider the hardship to the landlord, the hardship to H., and the hardship to H.'s child, but that the hardship, if any, to R. was irrelevant. *Harte v. Frampton* [1948] K.B. 73, approved and followed. *Cooley v. Walsh* [1926] I.R. 239 not followed. *McElroy v. Leonard* .. [C.A. 50

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MOTOR CAR—INSURANCE—*Limited company permitting servant to drive vehicle when uninsured—Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1930 (20 & 21 *Geo. 5, c. 24), s. 6—Whether limited company a "person"—Interpretation Act*, 1889 (52 & 53 *Vict., c. 63), ss. 2, 19.* Section 6 (1) of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, makes it unlawful for "any person" to use or permit the use of a motor vehicle on a public highway unless there is in force such insurance against third-party risks as complies with the requirements of that Act. By section 6 (2) of that Act if "a person" acts in contravention of the section he is liable to fine or imprisonment or to both, and "a person" so convicted shall be disqualified for holding or obtaining a driving licence. *Held*, that a limited company which permitted its employee to use a motor vehicle on a public highway was "a person" within the meaning of the section and could accordingly be convicted of an offence thereunder. The fact that the provisions of section 6 (2) relating to disqualification for holding or obtaining a driving licence are inappropriate to a body corporate which is not capable of holding or obtaining such licence does not constitute a contrary intention sufficient to displace the general rule contained in sections 2 and 19 of the Interpretation Act, 1889, under which "person" includes a body corporate. *Briggs v. Gibson's Bakery, Ltd.* [K.B.D. 165

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PRACTICE—PARTIES—*Adding a defendant—Objection of plaintiff—R. S. C. Order xvi, r.* 12. The court will not under Order xvi, r. 12, direct the joinder of a person as defendant who is not a necessary party to the maintenance of the action which the plaintiff has determined upon, and so to compel the plaintiff to make a new claim inconsistent with the one which he has previously made. A. sued B. for the balance due under a contract for the sale of trees. An application under Order xvi, r. 12, by C. to be made a defendant, alleging that the contract had been made between A. and C., and that he, C., wished to counterclaim for damages for breach of contract, was refused. *Montgomery v. Foy, Morgan & Co.* [1895] 2 Q.B. 321 distinguished. *Kelly v. Rafferty* [K.B.D. 187

PRACTICE—SEPARATE TRIAL OF ISSUE—*R. S. C. Order xxxvi, r.* 8. In an action by a workman against his employer for damages for personal injuries the question whether the workman has elected to claim compensation under the Workmen's Compensation Acts is not one on which the court will in its discretion direct an issue to be tried under Order xxxvi. r. 8. The court will only exercise its discretion to order an issue to be tried under Order xxxvi,r. 8, where there is a strong probability that by making such order the action will be determined more expeditiously and at less cost and inconvenience to the parties. *Delaney v. John Eastwood & Sons, Ltd.* .. .. [K.B.D. 66

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REVENUE—INCOME TAX—*Sand-pit opened in farmland—Sand sold by landowner—Income Tax Act*, 1918 (8 & 9 *Geo. 5, c. 40), Sch. A. No. III, r. 3—"Other concerns of the like nature."* A landowner working his land as a farm permitted another to open a sand-pit on the land and sold the sand therefrom over a period of years. *Held*, by the House of Lords, affirming the decision of the Court of Appeal in Northern Ireland (Andrews L.C.J. Babington and Porter L.JJ.) that the landowner was not carrying on a "concern of the like nature" within rule 3 of No. III of Schedule A. to the Income Tax Act, 1918. *Mosley v. George Wimpey & Co., Ltd.* [1945] 1 All. E. R. 674 overruled. *Edmonds v. Eastwood* (1858) 2 H. & N. 811approved. *Russell (Inspector of Taxes) v. Scott.* [H.L. 119

SETTLEMENT—Condition subsequent—*Forfeiture clause—" Become a " Roman Catholic or profess that he or " she is of the Roman Catholic religion " —Uncertainty—Infant—Parental duty —Public policy.* A condition subsequent in a re-settlement provided that if any person thereby made tenant for life or tenant in tail by purchase should " become a Roman Catholic or profess " that he or she is of the Roman " Catholic religion " then both such person and his issue should forfeit all interest thereunder. It was contended (i) that the condition was void for uncertainty in that the term " Roman Catholic " was ambiguous; that it was not possible to ascertain with certainty how or at what time a person " became " a Roman Catholic; and that it was not certain what acts or conduct would amount to " profess," or whether " religion " meant religious organisation or a system of belief; (ii) that the condition was void as contrary to public policy as tending to fetter the parents of any infant entitled under the settlement in discharging their parental duty with regard to the religious instruction of such child. *Held,* (1) that the term " Roman " Catholic " was unambiguous and meant a member of any church which acknowledged the supremacy of the Pope, and who accepted the authority of the Roman Catholic church in religious matters; that the question whether a person professed that he or she was of the Roman Catholic religion was whether such person had accepted the authority of the Roman Catholic church in religious matters, and that this was a question of fact which was capable of being precisely ascertained; that all persons who have become Roman Catholics must have made such an acceptance as aforesaid; and that accordingly the condition was not void for uncertainty. (2) that where the choice of religion may involve a forfeiture the court will not hold an infant to a binding choice uhtil he is old enough to choose his religion for himself and can be regarded as released from his father's right to determine in what religion he should be brought up, and accordingly the condition did not interfere with the father's right and was not void as contrary to public policy. *In re Borwick* [1933] Ch. 657 distinguished. *McCausland and others v. Young and others.* .. [Ch.D. 72

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